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SOME TENDENCIES IN CRIMINAL LAW ADMINISTRATION

THERE are two reasons why the enforcement of the criminal law as an aspect of public administration is difficult to subject to a realistic analysis. In the first place, it is too interesting and for that reason is subjected to an amount of newspaper attention which gives even the more serious readers a distorted conception of its constituent elements. The press interests itself in the unusual crimes, the sensational prosecution or the corrupt police department or court, and the public takes its impressions from the press. On the other hand, academic consideration of law enforcement has generally been to a large degree a study of law as it is written in the books, lacking the infinite variation of the law as it is reflected in practice. That the criminal law of the statutes is not the criminal law in action will appear in the course of this paper. And that the criminal law of the case books does not approximate complete reality is shown by the fact that so few cases ever reach the appellate courts. An overwhelming majority of the cases with which criminal law enforcement is concerned finds its way neither into the newspapers nor the case books. These cases are considered to no important degree by the public nor by students of law, although in fact they set the standards and shape the methods of the many governmental agencies charged with criminal law enforcement.

Some idea of the importance of the "average" criminal cases which appear neither in newspapers nor in law books can be gained from the total number of cases tried in some juris-

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dictions in the United States. More than fifteen thousand major cases were initiated by indictment in Philadelphia in 1926. In the two years ending June 30, 1926, the state of California returned 14,985 felony informations of which 5,765 were in Los Angeles alone. 9,949 preliminary hearings in felony cases poured through the Chicago Municipal Court in 1924. The same court in the same year summarily disposed of 72,075 misdemeanors and 197,936 quasi-crimes. There were in England and Wales in 1925, 59,903 persons charged with indictable offenses and while exact comparisons are dangerous because of varying practices in bringing arrested persons to trial, it is quite within the facts to say that the total of similar prosecutions in New York City, Philadelphia, Chicago and Detroit during the same year was quite considerably in excess of this number.

A demand for "reform" in the administration of justice has acquired a considerable momentum of late, and the legislatures recently adjourned ground out many laws amending criminal procedure. Sheer conjecture guided much of this legislative action. Little study was made as to the need for the laws enacted or the probable effect of them. Research into the fundamental conditions under which the administration of justice operates guides only a bare handful of states. And yet, without such research there is genuine danger that much of the legislation now hailed with such enthusiasm may not appreciably affect the recognized shortcomings of criminal law administration at all.

While there are serious limits to the extent to which exact methods can be used in such investigations, a fairly obvious test which can be used is a statistical determination of what dispositions are made of the cases handled by the courts with conveniently determinable correlations of significant factors. Such studies can reveal not only the importance and results of rules of procedure but the varying methods of administering these rules. It is probable that with an adequate amount of record data concerning the disposition of a considerable number of cases over a period of time, much that is significant concerning alternative rules of procedure can be determined. Moreover

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such a method can measurably indicate in advance what may be expected of some current proposals for "reform." Few of such proposals are actually new. In the variegated procedures, past and present, of the American states nearly every device has been tried and has left somewhere in the records the material for its investigation.

The data necessary for such interpretation are very difficult to collect and to weld into usable form. There are few public reports and such as we have from a number of police departments, a few attorney-generals and a scant handful of other officials, are almost useless for comparative purposes. Records are likewise inadequate. A vast amount of criminal law administration is conducted without records. Much of the remainder is hidden in antiquated and inaccessible dockets, in irregularly filed court papers, and in the generally unintelligible and sometimes dishonest records of city police departments.

A few somewhat intensive studies of these records in single cities and states have been made during the past six years. Through the published results of these studies we now have available some factual data concerning the disposition of criminal cases in several fairly typical major cities, a considerable number of smaller cities and a few rural areas. There remains of course as an insistently needed research project the exploration of other areas in order that the task of extended comparison and correlation may be undertaken, but on the basis of what we now have we may contemplate a few of the simpler comparisons. It is the purpose of this paper to indicate tendencies which seem to be fairly common as we view the results of the studies already made. It is quite possible that if these tendencies are followed in much more detailed studies, we may achieve a fair degree of enlightenment concerning the administration of criminal justice in the United States.

The most comprehensive of such studies of criminal cases has just been published by the Crime Commission of New York State.[1] In this study there were collected, tabulated and inter-

[1] *A Statistical Analysis of the Criminal Cases in the Courts of the State of New York for the Year 1925*, published by the Crime Commission of New York State (Albany, 1927).

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preted the essential procedural facts in 25,018 felony cases initiated in various jurisdictions of the State of New York in 1925. Another study of the same sort is contained in the Missouri Crime Survey.[1] This survey covered 10,516 felony cases originating in thirty-nine counties of the state widely distributed as to geographical location and as to the character and density of the population. In the three most completely urban counties (St. Louis City, Jackson and Buchanan Counties) the survey took all cases (except the liquor law violations) originating in the circuit courts from October 1, 1923 to the same date in 1924. In the remaining less densely populated counties the cases in the two years following October 1, 1922 were used. The total number of cases considered in the 36 smaller counties was about equal to that of the three urban counties. A third study was conducted in 1924 by the combined efforts of the American Institute of Criminal Law and Criminology and the Department of Public Welfare for the State of Georgia. Their collection of case data included cases originating in five Georgia counties[2] in 1916 and 1921. 12,062 cases were briefed and tabulated, of which 3,508 were felonies and 8,554 were misdemeanors.[3] In 1921 the Cleveland Foundation conducted a study of approximately 4,000 felony cases originating in the city of Cleveland in 1919–21. Following the publication of this study a private recording agency called the Cleveland Association for Criminal Justice was established which has maintained for six years a card index of all felony cases in the courts of that city.[4] The published bulletins of this organization contain detailed tabulations of the dispositions of these

[1] *The Missouri Crime Survey* (New York, 1926). The statistical interpretation of criminal law administration in this study was written by Professor C. E. Gehlke.

[2] These counties were Bibb, Lowndes, Tift, Randolph, and Fulton. The latter is the county containing the city of Atlanta.

[3] This study was published as "Crime and the Georgia Courts" in the *Journal of the American Institute of Criminal Law and Criminology*, vol. XVI, No. 2. It was also published as a monograph under the same name. The study was largely conducted by Mr. Hugh Fuller.

[4] In this article, where we use statistics relating to the year 1925, we are quoting from the bulletins of this organization.

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cases. A similar organization, the Baltimore Criminal Justice Commission, has gathered such records of selected felony cases since 1923. The Chicago Crime Commission has collected and tabulated a vast amount[1] of case data since its establishment in 1919.

Taken as a group, the New York, Missouri, Georgia and Cleveland studies offer for the study of criminal law enforcement a body of approximately 45,000 felony prosecutions scattered among four states presenting somewhat varied rules of procedure and social conditions. They cover several large cities and a sufficient number of small jurisdictions to yield useful comparisons. In the comparisons which follow we have occasionally used other sources such as the reports of attorney-generals in a few of the states where some system of central reporting of criminal cases is followed.[2]

Criminal Case "Mortality"

A reviewer, commenting upon a statistical summary of a study of criminal justice in a modern city, has remarked that if the Forty Thieves, whose names are associated with Ali Baba, had been arrested by the police of an American city, only six would have been punished.[3] With certain important limitations this is a not ineffective way of calling attention to the fact that of those arrested for crimes only a small percentage are convicted and punished.

An overwhelming majority of criminal cases never reach a trial by jury and a very considerable majority never reach sentence. They are disposed of by some of the numerous devices by which criminal procedure permits those accused of crime to be released.[4] In New York City in 1925 the percentage of

[1] In this article we have not referred to the reports of the Baltimore and Chicago Commissions on account of certain procedural differences which render comparisons somewhat misleading. The published report of these commissions, however, are invaluable sources for the study of judicial administration.

[2] Notably California and Minnesota.

[3] "Justice in the Stocks," by John W. Love in *The Survey Graphic*, vol. I, No. 1, p. 144.

[4] In all of the studies which are under consideration in this article, complete tables appear which indicate the number and percentage of cases disposed of in

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those arrested who were finally sentenced was about twenty. In Cleveland from 1920 to 1925 the average was about thirty per cent. Available data from other cities indicates that the average for the larger cities of the country is not far from twenty-five per cent. It will clarify this general statement to include here a tabular statement of the disposition of cases in New York City in 1925.

DISPOSITION OF FELONY CASES IN NEW YORK CITY IN 1927
(By percentage)

Number of arrests	19,468	
Per cent	100	
Disposed of by police		1.97
Eliminated in preliminary hearing		56.91
Eliminated by grand jury		12.24
Eliminated in trial court		8.31
Eliminated after sentence by suspension of sentence or appeal		5.15
Imprisoned or fined	15.42	

On account of differences in procedure[1] it is not possible to compare closely these proportions arrived at in New York with those of Missouri. Starting with a different basis, however, (with "warrants issued" not "arrests") the "mortality" of Missouri cases was as follows:

DISPOSITION OF FELONY CASES IN THE COURTS OF MISSOURI, 1922–24
(By percentage)

Number of warrants issued	7,032	
Per cent	100	
Eliminated in preliminary hearing		26.08
Eliminated by prosecutor or grand jury		3.26
Eliminated in trial court		32.55
Paroled, appealed, etc.		6.37
Sentence executed	31.74	

each of the stages of procedure. They are occasionally called by a term borrowed from the life-insurance actuary, "mortality" tables. They indicate the percentages of disposition (or death) of cases at each step in the procedure. See *Criminal Justice in Cleveland,* pp. 91-96; *Missouri Crime Survey,* pp. 272-290; *Crime and the Georgia Courts,* appendix; *Report of Crime Commission of New York State,* pp. 54-61.

[1] Two differences make comparison between the two states impossible. Felony cases in Missouri after an arrest is made can proceed only after the prosecutor has issued a warrant. In New York City the police take the arrested person directly to the magistrate's court.

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The fact that a considerable proportion of our criminal cases is terminated somewhere between arrest and sentence has always been well known to criminal lawyers, prosecutors and judges. The determination of the exact percentages, however, by the studies which we cite has given us a more exact perspective and has raised a number of somewhat significant questions as to the effectiveness of our present rules of procedure. Some commentators have used these proportions of successful and unsuccessful prosecutions as a challenge to the entire efficiency of criminal justice. Chancellor Herbert S. Hadley, a former prosecutor of an urban county as well as an Attorney-General and Governor of his state, speaking of the small percentage of those charged with crime who are finally punished, concludes:

> Stated in terms of percentages, the result is that our system of apprehending and prosecuting those guilty of criminal offenses is only from 5 per cent to 10 per cent efficient; considering those apprehended and indicted for major offenses it is only from 25 per cent to 30 per cent efficient, and including those tried for major offenses about 50 per cent efficient. Such figures stated in the abstract oftentimes mean little to the casual reader, but if he should stop to consider a similar result in the conduct of a business such as banking, transportation or manufacturing with a percentage of efficiency from only 5 per cent to 50 per cent, he could more clearly realize the seriousness of the problem that confronts society today, depending as it does for the protection of life and property upon a system of apprehending and prosecuting violators of the law which is from 50 per cent to 95 per cent inefficient.[1]

This statement should not be accepted without a number of distinct reservations. In the first place, the exact percentages of dispositions are to a slight degree modified by cases pending and by certain unavoidable losses, such as the death of the defendant. These, however, are small. There are cases in which the defendant has been convicted of another crime, perhaps in another jurisdiction or state. There are cases in which witnesses have died, have forgotten, or have decided not to re-

[1] *Missouri Crime Survey*, p. 350.

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member. Eliminating these and a number of other eliminations over which official agencies have little control, we still have a large number, perhaps a majority, of criminal cases eliminated prior to that stage of procedure where a jury trial actually begins. These cases constitute the "problem" cited by Chancellor Hadley.

The record does not yield an exact statement of the reasons why these cases are eliminated. We may, however, venture a number of opinions. It is probable that most of the "mortality" results from differences of opinion among police, magistrates, prosecutors, judges and jurors. These differences of opinion are accentuated by personal interest. The police are likely to overestimate their own work as it is represented in a prepared case. Magistrates do not want the cases which they bind over to be "no-billed" by grand juries; grand juries do not want their indictments to result in acquittals; and trial judges do not want to permit cases to go to trial in which acquittals may result. Above all, the ever-present influence of the prosecutor used to prevent the danger of acquittals. These factors illustrate that where bias exists it largely favors the accused. This may be answered by saying that there is also bias of another sort which may prompt the prosecution of persons on flimsy evidence in order to make a showing of law enforcement. It is not likely that this is present in more than a few isolated instances, however, while the tendency to avoid unsuccessful prosecutions is continuous and very potent.

Turning from those influences which are subconscious to those influences which are deliberate, we have the ever-present tendency of the police to shift responsibility to the courts in doubtful cases. A police department is very sensitive to the pressure of public opinion and is always able to swell the number of arrests. There is also the powerful influence of politics and private favor which brings about the termination of many prosecutions against those who have powerful friends and "connections".

These influences where united are sufficient to explain case "mortality". A sophisticated observer is likely to wonder why the rate of unsuccessful prosecutions is not still higher.

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It is, of course, easy to quarrel with Chancellor Hadley's use of the term "efficiency" in describing the relation of arrests to punishments. It can be said that while Mr. Ford never would have succeeded if he had scrapped three motors every time he produced a finished product, it is also true that the rate of successful business enterprises (even in Mr. Ford's own field) is so small as to reveal Uncle Sam in as unfavorable a light in business as in law enforcement. But the analogy fails to account for the fact that anyone can start a business but the state must start a prosecution. If Chancellor Hadley means that the state is starting several times as many prosecutions as it is able to complete, he is not far from right. The stark truth is that either the police are charging many innocent persons with serious crimes or the courts, juries and prosecutors are turning loose many dangerous criminals. In either case the explanation commonly given that prosecutions fail because evidence is hard to get does not impair a charge of inefficiency. It strengthens it.

Our recital, however, of the forces and influences which contribute to the net result shown in the "mortality" tables indicates the complex factors which are involved in an analysis of how charges of crime are made, sifted, prepared for trial and ultimately brought to a conclusion. In this process the actual rules of procedure are important rather than conclusive. The quality of the officials concerned, their traditions, impulses, political responsibilities are involved to a very great degree.

The Preliminary Hearing

In the large cities most felony cases do not get beyond the preliminary hearing. The examining magistrate is required by common law and by the statutes of most of the states to determine whether there is "probable cause" to suspect that the defendant is guilty. The more important dispositions in the preliminary hearing are "discharged", "charge reduced to and disposed of as misdemeanor" and "bound over to the grand jury", or in certain states, to await action by the prosecutor. The following table indicates the proportion of cases which survive this stage of procedure in five cities:

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DISPOSITION OF CASES ENTERING PRELIMINARY HEARING[1]

	New York City 1925		Chicago Year Ending Dec. 1, 1924		Cleveland 1925		St. Louis Oct., 1923 to Oct., 1924		Kansas C Oct., 192 Oct., 19	
	Number	Per cent	Number	Per cent	Number	Per cent	Number	Per cent	Number	P c
Cases entering P. H.	19,084	100.	9,949	100.	2,513	100.	1,492	100.	1,697	10
Discharged or dismissed	11,079	58.05	6,263	62.95	972	38.67	417	27.95	858	5
Remaining	8,005	41.95	3,686	37.05	1,541	61.33	1,075	72.05	839	4

Assuming that these cities are typical, the fact emerges that most of the decisions that determine the course of justice in criminal cases are made in the preliminary hearing by judges of the inferior courts. In the cities listed in the table above these judges are paid a relatively small salary and are selected for short terms. Except in New York City they are elected. Their decisions are made under conditions which are not favorable for the exercise of a reasonable degree of judgment. They are made in a great hurry, in the midst of utter confusion, usually without the presence of defense counsel and frequently without the presence of representatives of the state. When assistant prosecutors do attend, their participation is most perfunctory. In Chicago, for instance, the state's attorney for the most part ignores the Municipal Court to which he is politically hostile. There seems to be a general tendency to permit the sole responsibility for disposing of these cases to rest upon the magistrate. The political factor involved is very great. Machine politics is always heavily entrenched in the inferior courts. If there is to be any "fixing" of criminal cases, the wise and effective politician does his work here. He is protected by confusion and haste, and he deals with but one person. If his case slips through the preliminary hearing his task is multiplied many fold. He must deal with more persons in a more rarified atmosphere. There is the danger of attracting newspaper attention. The prosecutor may be recalcitrant, or the grand jury

[1] The data here shown are drawn from the studies already cited. The Chicago data are from the *Eighteenth Annual Report to the Municipal Court of Chicago.*

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or the trial judge may unexpectedly take special interest in the case. Consequently the forces which so often effectively prevent the adequate prosecution of professional criminals concentrate their strength upon the preliminary hearing.

The preliminary hearing in rural districts seems to play quite a different role. A much smaller proportion of cases are dismissed there than by the city magistrate or justice. In the rural districts included in the New York and Missouri studies the proportion was as follows: [1]

DISPOSITION OF CASES ENTERING THE PRELIMINARY HEARING [2]
(In Non-Urban Jurisdictions)

	New York State		Missouri	
	Number	Per cent	Number	Per cent
Cases entering P. H.	1,063	100.	3,543	100.
Discharged, dismissed or otherwise finally disposed of	119	11.19	378	10.67
Held for grand jury or prosecutor	944	88.81	3,165	89.33

The difference between urban and rural jurisdictions in the proportion of cases eliminated in preliminary hearings is rather marked, but easy to explain. The principles upon which urban police operate differ distinctly from those actuating the rural sheriff, constable or state trooper. When a crime is committed in the country no "drag nets" are thrown out with a consequent catch of familiar suspects and "repeaters". Arrests

[1] Data concerning the administration of the office of the rural justice of the peace are very difficult to uncover. This ancient local officer sometimes keeps a docket, but more often his cases are recorded only on returned warrants and other legal papers which seem to be preserved only for the purpose of collecting fees. Papers are often inaccessible or unintelligible. A greatly needed systematic analysis of the office as it operates in the United States is being undertaken in a study of Rural Criminal Justice by Mr. Bruce Smith of the National Institute of Public Administration.

[2] The facts concerning the disposition of these cases in the preliminary hearings were not included in the published report of the State Crime Commission but are complete and accurate. They were gathered from various rural counties of the state by troopers of the State Police Department.

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more frequently follow than precede investigation. When an arrest is made for a felony it is usually on the authority of the very justice of the peace who subsequently conducts the preliminary hearing. He usually has made up his mind as to "probable cause" before the arrest is made. Moreover when an arrest is made the prosecutor is usually behind it, and his personality dominates the justice of the peace. Another factor contributing to the statistical result shown above is the fee system. Cases bound over are usually more profitable to the justice than cases dismissed.

The Dominant Influence of the Prosecutor

One of the most clearly defined results of the quantitative measurement of criminal law administration is the evidence which it has revealed of the dominant position of the prosecutor in American states. His influence can scarcely be overestimated. In rural counties the decay of the sheriff and constable has compelled him to investigate crimes, to gather evidence and frequently to make arrests.[1] In some states, notably Missouri, he may bring the efforts of the arresting officer to an end by refusing a warrant. He may, if he so desires, participate actively in the preliminary hearing. If the magistrate decides to dismiss the case the prosecutor may nevertheless take it to the grand jury. In states where prosecutions must be initiated by indictment he usually reduces the function of the grand jury to that of a rubber stamp, because he is present at its sessions, actually conducts most of its inquiries and is practically its only source of legal advice. In several states he may initiate prosecutions by information drawn upon his sole responsibility. In most states he may terminate a case by a *nolle prosequi*, usually with the formal consent of the court. He may deal directly with the defense and secure a plea to the offense charged or to a lesser offense and in these arrangements usually secures with perfect ease the approval of the court. He may by acquiescence permit a case to be dis-

[1] An interesting example of this is shown in Dreiser's *An American Tragedy*. The District Attorney there portrayed, while overdrawn, has characteristics not difficult to find in many counties in the United States.

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missed on motion of the defense. He is frequently consulted by the judge in fixing sentence, in suspending sentence, or in granting probation. After the sentence his influence is still potent, for the authorities usually seek his opinion before granting pardons and paroles. It need hardly be added that in trying a case before the jury the case of the state depends upon him. If he is the chief of a large urban prosecutor's office he may, by the adroit choice and management of his staff, contribute heavily to the public's respect for law enforcement. On the other hand he may assign incompetents to represent him and "ride the horse to lose". The prosecuting office is the keystone of criminal law enforcement.

That the legal, administrative and political powers of the prosecutor are freely exercised in practice is amply shown in the studies under consideration. In the Missouri survey, for example, a table appears which shows the proportion of cases terminated in the two largest jurisdictions of the state by the judge, the prosecutor and the jury. It will be seen that in both jurisdictions the prosecutor terminated many more cases than the judge, and in St. Louis his use of discretion accounted for almost half of the cases:

Disposition	St. Louis City		Jackson County	
	Number	Per cent	Number	Per cent
Total charges	2,474	100.	2,070	100.
Eliminated by prosecutor	1,228	49.64	677	32.71
Eliminated by judge	300	12.12	324	15.65
Other dispositions	946	38.24	1,069	51.64

Prominent among the methods by which prosecutors exercise their power is the *nolle prosequi* or "nol pros" as the action is commonly called.[1] This method of abandoning a pros-

[1] A *nolle prosequi* is in criminal actions "a formal entry upon the record by the prosecuting officer . . . by which he declares that he will no further prosecute the case either as to some of the courts, or some of the defendants, or altogether." *Black's Law Dictionary.* If entered after the jury is sworn it amounts to an acquittal. Clark, *Criminal Procedure,* pp. 154, 443.

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ecution may be exercised for a number of perfectly justifiable reasons: the indictment may be deemed by the prosecutor to be fatally defective, witnesses for the state may disappear beyond hope of recovery or the defendant may be convicted in another court or on another charge in the same court. In some states the *nol pros* may be entered entirely upon the responsibility of the prosecutor, in others consent of the court is necessary. In all states where it is permitted, however, the approval of the court becomes a mere formality in all but most unusual cases. That this is a most important power and one which may be and unquestionably is used improperly is shown by the large number of statutes in various states which are aimed at the strict regulation of its use. In Pennsylvania the written consent of the court is required, in many states written reasons must be given by the prosecutor, while in others strict penalties are specially provided for entering a *nol pros* in pursuance of a corrupt agreement. In New York the entry was abolished by act of the legislature.

In spite of every evidence in the law that the *nol pros* is legally intended to be exercised only in unusual cases, it is in fact used with the utmost freedom. The following table assembles for comparative purposes a number of typical jurisdictions:

THE USE OF THE *Nolle Prosequi*

(Urban Jurisdictions)

	Cleveland 1925		St. Louis Oct., 1923 to Oct., 1924		Hennepin Co. (Minneapolis) 1923		Fulton Co. (Atlanta) 1921	
	Number	Per cent	Number	Per cent	Number	Per cent	Number	Per cent
Indictments or informations returned	1,110	100.60	1,000	100.00	1,024	100.00	2,180	100.00
Terminated by *nol pros*	126	11.35	102	10.2	293	28.61	285	13.07

The free use of the *nol pros* is severely criticized in the Mis-

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souri, Cleveland and Georgia surveys. It is not always apparent on the face of the court record that the prosecutor has adequate reason for his action. The Cleveland survey suggests[1] that there be required reasons with public notice for entering the *nol pros*. Such measures may not prove effective, however. They are already required in some jurisdictions and are met by purely perfunctory statements such as "insufficient evidence" or "witnesses missing", which permit precisely the same abuses that the requirement was intended to prevent.

In New York, where the formal *nolle prosequi* is abolished, the court may "upon the application of the district attorney, and in furtherance of justice, order an action, after indictment, to be dismissed."[2] This provision was intended as a substitute for the abolished *nolle prosequi* but was intended, according to the Court of Appeals, to be "seldom exercised".[3]

The spirit of this admonition is hardly observed because in 1925 a total of 11.2 per cent of cases were dismissed either on motion of the district attorney (2.35 per cent) or on motion of the defendant's counsel (8.85 per cent). The cases dismissed on motion of the defendant's counsel include, of course, a large number which the district attorney does not contest. The proportion thus dismissed is about the same as the proportion of *nol proses* in other states. The practice exists although the name is gone.

If one may venture a prediction in a field so full of uncertainties, the use of the *nol pros* will become less frequent as the press and the public become better informed as to its character. It is probable that as a compensation, more activity will center about the determination of the plea of the defendant. Space does not permit an extended discussion here of the plea and the prosecutor's interest in it. It is sufficient to say that if the prosecutor can induce the defendant to plead guilty he has for all practical purposes won his case, and what is more im-

[1] Pp. 207 and 329.

[2] Sec. 672 of the *Code of Criminal Procedure*.

[3] People *v.* Willis (1898), 23 Misc. 568, 52 N. Y. Supp. 808; People *v.* Montgomery (1901), 36 Misc. 326, 73 N. Y. Supp. 535.

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portant, he has saved himself the trouble and time of conducting a trial to a jury. It is easy to see that he will make every effort and yield every possible concession to secure a plea of guilty. The extent to which pleas of guilty outnumber pleas of not guilty in practically every jurisdiction in the United States indicates the success with which the prosecutor pursues his ends. The following table indicates the proportions of pleas in several selected jurisdictions.

PLEAS OF GUILTY AND OF NOT GUILTY [1]

	New York City 1925		Cleveland 1925		St. Louis Oct., 1923 to Oct., 1924		Hennepin Co. (Minneapolis)		Fulton C (Atlant	
	Number	Per cent	Number	Per cent	Number	Per cent	Number	Per cent	Number	P c
Total pleas	5,622	100.00	1,066	100.00	1,000	100.00	731	100.0	1,083	10
Pleas of guilty	3,508	62.40	686	64.35	585	58.5	608	81.8	476	4
Pleas of not guilty	1,977	35.16	380	35.65	415	41.5	123	18.2	607	5

In the table shown above we have included as "pleas of guilty" not only those whose pleas were guilty to the offense charged but a considerable number whose plea was guilty to some other offense. This means in practice that with the permission of the court the defendant is usually allowed to plead guilty to and to be punished for a crime less important than the one originally charged. In the Missouri Survey one-third of all pleas of guilty were to a lesser offense. In New York the tendency to permit pleas to another offense is so striking that we reproduce here the entire table showing pleas in the five counties constituting greater New York:

[1] In the New York figures shown here no account is made for a number of "miscellaneous" pleas.

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PLEAS IN FIVE NEW YORK CITY COUNTIES

Pleas	New York City	New York		Kings		Bronx		Queens		Richmond	
	Per cent	Number	Per cent	Number	Per cent	Number	Per cent	Number	Per cent	Number	Per cent
y, offense arged	13.95	435	12.38	137	12.11	106	21.95	92	25.21	14	10.85
ty, other ense	48.45	1,755	49.94	650	57.47	196	40.58	57	15.62	66	51.16
guilty (final)	35.16	1,281	36.46	307	27.25	138	28.57	202	55.34	49	37.98
thers	2.44	43	1.22	37	3.27	43	8.80	14	3.83	..	....
Total	100.00	3,514	100.00	1,131	100.00	483	100.00	365	100.00	121	100.00

While the available data on this point from other jurisdictions are very limited, it is probable that the tendency to accept pleas to a lesser offense is present everywhere but that the New York proportion is rather higher than most.

A large proportion of pleas to another offense of course represents the consummation of bargains between defendants and prosecutors by which the record of the prosecutor is kept clear of a possible acquittal and on the other hand the defense is saved from the danger of a conviction of a more serious offense. The very fact that in any research in this field it is so difficult to disentangle the "pleas to another offense" from "pleas of guilty"[1] indicates the safety from public criticism which the prosecutor enjoys in accepting pleas to another offense.

Moreover there is ample evidence in the studies of criminal procedure which we are considering, that a plea of guilty to the offense charged is usually given in return for an express or implied promise of more lenient treatment. The evidence to support this is found in the greater proportion of suspended sentences and other marks of leniency which mark those cases

[1] In the few attorney general's reports where pleas are reported there is no distinction. In most prosecutors' reports pleas of guilty are lumped with convictions.

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in which pleas of guilty are entered. All of the courts included in the Georgia study sentenced a smaller proportion to imprisonment of those who offered pleas of guilty than of those who were convicted. In Missouri the tendency was the same. In New York it was quite evident that pleas of guilty were more likely to receive suspended sentences.

It should not be assumed that pleas of guilty are entirely due to bargaining between the defense and the state. There are many jurisdictions where the prosecution is so weak that very few will plead guilty, thus forcing trial in the expectation that the defense has a good chance to win an acquittal. It is clear, nevertheless, that most pleas of guilty are offered because of a clearly conventionalized defense strategy. They are not evidences of abject surrender.

Trial by Jury

The large proportion of cases summarily dismissed in the preliminary hearing, concluded by means of a plea of guilty and eliminated by the *nol pros*, leaves a rather limited number to be subjected to the formalities of a trial. In Missouri, the survey[1] found that of each one hundred cases in which warrants were issued, only twelve in the state as a whole (ten in the three large counties, fourteen elsewhere) actually faced a jury. In Cleveland in 1925 slightly over nine per cent of felony arrests reached a verdict by a jury. In New York City in 1925 slightly less than twelve per cent reached a verdict. These we believe indicate the fact that trial by jury is reached in not more than one-tenth of felony cases. The facts already cited indicate that more than three times as many sentences are administered after a plea of guilty than after conviction.

Viewed from another angle there seems to be little reason for the fear sometimes expressed that the "leniency" of juries is responsible for an increase in crime. Juries actually are responsible for only a very small per cent of the instances wherein a person accused of crime is liberated. The Missouri study[2]

[1] *Op. cit.*, p. 302.

[2] *Ibid.*, p. 302.

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shows this quite clearly in figures giving the proportion of cases acquitted after trial. Of a total of 4,352 cases eliminated before sentence, only 323 were acquitted by a jury.

A comparison of the number of acquittals with the number of convictions is interesting but hardly significant. The freedom with which cases are eliminated before trial renders these ratios rather unimportant although they are always used by prosecutors in seeking reelection. We submit the proportions in a few typical instances:

CONVICTIONS AND ACQUITTALS

	New York City		Cleveland 1925		St. Louis Oct., 1923 to Oct., 1924		Hennepin Co. (Minneapolis) 1925		Fulton Co. (Atlanta) 1921	
	Number	Per cent	Number	Per cent	Number	Per cent	Number	Per cent	Number	Per cent
tal	794	100.00	254	100.00	180	100.00	123	100.00	607	100.00
quitted	499	25.24	75	29.52	83	46.11	52	42.27	188	30.97
nvicted	295	14.93	179	70.85	97	53.89	71	57.73	419	69.03

There seems to be a tendency among those who propose reforms in criminal procedure to emphasize the desirability of eliminating the ancient and venerable grand jury as an indicting agency and to substitute for the indictment an information filed by the prosecutor. A number of states, without abolishing the grand jury, have provided for the information as an alternative. Not much dependable information is yet available to indicate the effect of this change, but the extent to which the information is used when the alternative is permitted indicates that the grand jury, long an important part of our judicial machinery, may be on its way to obsolescence. The Missouri study found that the information was generally used in over 85 per cent of all prosecutions, in some counties the percentage running to 96 per cent. Thus the grand jury while still legally endowed with the power to indict, practically ceases to function when the more convenient and economical method of filing informations is permitted.

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While there may be some disagreement on the subject, the position may reasonably be taken and defended with considerable evidence that both grand and petit juries in criminal procedure may be on their way to desuetude, in spite of their honored place in the romance of things legal and governmental.

The Trial Judge

In the trial of criminal cases, if not elsewhere in judicial administration, there is a striking difference between the nominal and the actual influence of the judge. He is generally thought to be the master of the trial. Actually he is not. Some of his impotence is due to his lack of facilities for acquiring information. Some is due to the impossible demands which the law makes of him, but a large part is due to his political entanglements.

We have already indicated that the approval by the judge of the *nol pros* is almost always a merely formal matter. The judge may legally compel the prosecutor to produce complete and satisfactory reasons for such an action, but actually he would have difficulty in enforcing such specifications. In the acceptance of pleas the judge is likewise at the mercy of the prosecutor. The decisions which the judge must make in such cases depend upon matters of fact, not of policy nor of opinion. Facts are marshaled by administrative facilities which are for the most part possessed by the prosecutor. The judges in some jurisdictions of course have their probation departments which they are using more and more as means of informing themselves in the making of decisions, but properly equipped probation departments are rare.[1]

In cases when the judge has discretion as to the term of the sentence his method of fixing the number of years is the vaguest kind of guesswork. In the New York study it is shown that in the longer sentences the judges invariably ran to multiples of five. There probably would be found in any detailed study of sentencing ample argument for the indeter-

[1] The most important service that probation can perform is to arm the court with facts upon which informed judicial decisions can be made. See E. T. Cooley, *Probation and Delinquency* (New York, 1927).

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minate sentence system, in the fact that judges in fixing terms do not actually follow any other rule than the rule of thumb. The statistical data assembled in Georgia, Missouri and New York indicate no consistency among various judges as to the punishments which they fix for the same crimes. If the rule be valid, as most American judges would probably contend, that "the punishment should fit the crime", there is little in their records which indicates that they act upon any such rule.[1]

Perjury, according to the opinions of the well informed, is rather common in American state courts. There is of course no way to measure its extent. It is easy, however, to determine what is done about it. Prosecutions for this serious offense against the whole judicial system are infrequent and for the most part unsuccessful. In the Cleveland survey[2] it was shown that in 1919, of 3,000 felony prosecutions which entered the jurisdiction of the trial court only twenty-seven were offenses against public justice of which twenty were bribery and seven perjury. Of these cases three were "no billed" by the grand jury, twelve were dismissed for want of prosecution, seven were *nol prosed*, three were acquitted by jury, one pleaded guilty and one was convicted by jury. Of the two whose guilt was thus established one received a bench parole. Thus in a large city where, according to common knowledge, the crime of perjury was frequently committed, only seven prosecutions were attempted, of which only one paid a penalty. In Fulton County, Georgia, in 1921, only four of a total of 2,180 defendants were charged with perjury, and two with attempts to commit perjury. Of these six cases, two pleaded guilty, one was *nol prosed* and three were pending. In the other four counties of the state included in the Georgia study, three defendants were charged with perjury or attempted perjury, with a net result of three *nol proses*. In the entire state of Minnesota in 1924 there were ten charges of perjury in a total of 4,044 felonies. Of these, four pleaded guilty (to some charge), one was

[1] See a discussion of the variations among judges in this respect in *Criminal Justice in Cleveland*, pp. 303-310.

[2] *Op. cit.*, pp. 337-339.

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found guilty and three were *nol prosed*. In the entire state of New York in the year of 1926, only 18 of 9,479 felony convictions were for perjury. This is some measure of the impotence of the judges of the courts against a common crime committed for the most part in their actual presence.

Perhaps little statistical demonstration is needed to sustain the proposition that criminal court judges, as Finley Peter Dunne remarked nearly twenty years ago "folly th'illiction returns". Ample data are available in the studies under consideration to show fluctuating judicial policies which are unquestionably due to attempts to set judicial sails so that they may catch every favorable breeze. In the Missouri survey this appears clearly in the study there made of the disposition of liquor cases. In Cleveland, the survey[1] demonstrated this in its study of paroles and other acts of judicial discretion. In the January term of 1917 it was found that fifty-three per cent of those whose guilt was established were given bench paroles. After a widespread popular clamor against leniency which reached its height in 1919, paroles were given more sparingly until in the September, 1920, term the percentage of paroles had dropped to eleven. To give pictorial point to this the report shows photographs of pages in the conviction book in each term.[2] The effect of this change in judicial policy was apparent rather than real, however, because criminal lawyers apparently shifted their pressure from the judge to the prosecutor and sought *nol proses*. In 1914 the per cent of paroles was twice as large as *nol proses*, in 1920 the order was reversed. Thus the lenient agency supplants the strict one in the disposition of cases.[3]

Law vs. Practice in Liquor Law Enforcement

In the vast mass of controversial material concerning the enforcement of prohibition there is very little reliable published information concerning the cases which have arisen under state

[1] *Op. cit.*, pp. 323-329.

[2] *Op. cit.*, pp. 324-325.

[3] See R. Moley, *An Outline of the Cleveland Crime Survey*, pp. 12-18, for a discussion of the politics of this phase of criminal procedure.

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enforcement laws.[1] In the Missouri Study, liquor cases of felony grade were separated, in the process of collecting and tabulating, from other felonies and we have as a result a very good index of the practice of the courts of that state in dealing with such cases.

A total of 2,112 cases involving a felonious violation of the state prohibition-enforcement law were studied. This did not include all cases of that character in the cities during the period for which the survey was made [2] but the number was sufficiently large and the jurisdictions sufficiently scattered to yield a representative group. The table which follows shows the disposition of these cases under a grouping which permits the comparison of four kinds of jurisdiction; St. Louis with 100 per cent urban population, Jackson County with 91.4 per cent of its population included within the limits of Kansas City, Buchanan County, including St. Joseph which accounts for 83.2 per cent of the county's population and the thirty-six other counties, the urban population of which ranges [3] from nothing to 69.9 per cent.

[1] Most of the statistical material used has concerned numbers of reported crimes, especially drunkenness, and numbers of arrests. Much of this is of doubtful validity because of the unreliability of "crimes reported" statistics to most of our cities and the further fact that the number of arrests varies with the always fluctuating policies of a police department.

[2] Oct. 1, 1923 to Oct. 1, 1924 in the three large counties; Oct. 1, 1922 to Oct. 1, 1924 in the remainder of the counties studied.

[3] The disposition of cases in these counties arranged in seven groups is shown in the *Missouri Crime Survey*, pp. 305-306.

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DISPOSITION OF LIQUOR CASES IN MISSOURI

(Percentages of Cases Eliminated in the Several Stages of Procedure)

Disposition	Total for State	St. Louis City	Jackson County	Buchanan County	Total Three Urban Counties	Total Thirty-six Counties
Warrants issued	100.00	100.00	100.00	100.00	100.00	100.00
Preliminary hearing:						
1. Discharged	2.77	1.29	3.27	22.86	4.03	1.82
2. Disposed of as misdemeanor	35.64	93.55	83.99	5.71	81.46	1.21
3. Dismissed for want of *pros.*	2.16	.....	6.21	2.86	4.63	.76
4. *Nolle prosequi*	.95	.....	.....	2.86	.20	1.52
5. Other dispositions	.69	.65	.98	5.71	1.21	.45
6. Total	42.21	95.48	94.44	40.00	90.93	5.76
Grand Jury and Circuit or Pros. Attorney:						
1. No true bill	57.79	4.52	5.56	60.00	9.07	94.24
2. No information needed	1.90	1.29	.....	.....	.40	3.03
3. Total	1.90	1.29	.....	.....	.40	3.03
Circuit Court	55.58	3.22	5.56	60.00	8.67	91.21
1. *Nolle prosequi*	16.52	.....	3.27	28.57	4.03	25.91
2. Disposed of on action of court	5.10	.65	.33	11.43	1.21	8.03
3. Tried and acquitted	1.90	.65	.98	.....	.81	2.73
4. Other dispositions	10.03	.....	.....	.....	.40	17.27
5. Total	33.56	1.29	55.23	40.00	6.45	53.94
Sentence Imposed	22.32	1.94	.33	20.00	2.22	37.27
1. Paroled	4.33	.....	.....	5.71	.40	7.27
2. Appealed	2.42	.....	.....	.....	.....	4.24
3. Other dispositions	.....	.....	.....	.....	.....	.....
4. Total	6.75	.....	.....	5.71	.40	11.52
Sentence Executed	15.48	1.94	.33	14.29	1.81	25.75
1. Committed to penitentiary	3.46	.....	.....	.....	.....	6.06
2. Committed to reformatory	.26	.....	.....	5.71	.40	.15
3. Committed to jail	4.84	.....	.....	2.86	.20	8.33
4. Committed to workhouse	.....	.....	.....	.....	.....	.....
5. Fine paid	3.46	1.94	.33	2.86	1.01	5.30
6. Other dispositions	3.46	.....	.....	2.86	.20	5.91
7. Total	15.48	1.94	.33	14.29	1.81	25.75

The significant conclusion which emerges from a consideration of the foregoing table is not alone the fact that relatively fewer liquor-law violations are punished in urban than in rural communities, but the apparent ease with which an enforcement law is by perfectly legal processes made to mean one thing in

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one part of the state and another thing in another. In fact, the processes of administration very conveniently mould the operation of a law when such administration is subject to the pressure of public opinion. Perhaps no better example of this fact could be presented. The negative correlation between the percentage of "urban-ness" and the percentage of punishment is very high. Whatever doubtful view we may take of criminal procedure in America, it cannot be said that it does not easily shape itself to the likeness of the community.

In order to provide a convenient comparison between liquor and non-liquor felony cases, there is shown in the following table the disposition of cases in the courts of Missouri during the period studied, arranged according to the various steps in elimination:

LIQUOR AND NON-LIQUOR CASES COMPARED

Disposition		Total Urban Counties	Total 36 Counties
		Number	Number
Total warrants issued		4985	4203
		Per cent	Per cent
Eliminated:		100.00	100.00
In preliminary hearing	liquor	90.93	5.76
	non-liquor	41.73	10.67
No information issued	liquor	.40	3.03
	non-liquor	3.15	3.36
In circuit court	liquor	6.45	53.94
	non-liquor	21.93	43.01
Paroled and appealed	liquor	.40	11.52
	non-liquor	3.70	9.00
Punished	liquor	1.81	25.75
	non-liquor	29.49	33.95

It will be noted that this table has as its basis the number of warrants issued. The prosecutor, however, exercises wide discretion in issuing warrants. In St. Louis City it will be noted that he issued 155 warrants in felonious liquor-law violations. His records indicate that 697 warrants were requested by the police and that he refused 542. Thus the attempt to prosecute 697 certain liquor-law violations as felonies in the City of St. Louis resulted in three fines. It should be added that a large proportion of these cases was disposed of as misdemeanors.

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This abject failure of legislative action should be considered not only in connection with prohibition enforcement. It has more general point in showing that passing severe laws against other sorts of crime may also prove to be an empty gesture. Not law, but law enforcement sends people to prison. And law enforcement follows the public opinion, not state-wide opinion either, but county opinion, so long as a chief law-enforcement officer is elected in each of three thousand counties in the United States.

There are a number of other factors in the present administration of criminal law upon which we now have useful data. The administration of bail is an example.[1] The bail bond is intended to bind a surety to make certain the presence of a defendant. The facts as to the operation of bail in American states indicate clearly that there is actually no binding force at all in the recognizance. Forfeited bail is only infrequently collected,[2] while the courts of the larger cities are swarming with professional bondsmen. The surprising thing is the fact that in spite of the flimsy character of the obligation of bail few defendants actually escape trial for that reason, a condition which leads to the conclusion that while "straw" bail is popularly believed to be a major crime "problem", it actually does not seem to do much to impede the course of criminal justice. The studies under consideration have also presented a number of conclusions concerning the time required to try criminal cases. Due to varying methods of recording and of computing time intervals, it is not possible to draw striking comparisons. In New York, however, it is clearly shown that the presence of the grand jury as a factor in procedure is one of the most important reasons for delay. In all of the studies where the time element was included, the usual impression that delay helps the defendant was verified. Appealed cases over a period of ten years were included in the Missouri study with some rather striking results as to types of cases usually reversed and as to the prevailing reasons for reversals.

[1] On this, see the *Missouri Crime Survey*, pp. 189-218, also A. L. Beeley, *The Bail System in Chicago* (Chicago, 1927).

[2] In Missouri only $1572.80 of a total of $292,400 of forfeited bail was collected.

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The conclusions expressed in this article indicate a few of the broad tendencies with which the study of judicial administration and perhaps the revision of criminal procedure in the various states will be compelled to deal. Such revision as we may expect will achieve its highest measure of usefulness only if it proceeds with an adequate amount of factual data as its guide and if in addition it is sufficiently aware of the tendencies shown in the studies already made. The studies, however, which we have considered are only the first spade-work of what must be done. All of them were limited by time, available funds and personnel. But the tabular results of the thousands of cases included in the studies may well furnish comparative data for other studies yet to come.

The study of judicial administration by mass statistics has very obvious limitations. It needs to be supplemented by intensive case investigations, perhaps of the sort that social welfare work uses with marked success. The method of general observation coupled with the gathering of shrewd opinions and observations of those who are in daily contact with the courts are indispensable to supplement more scientific and exact measurements.

Much remains to be done, moreover, in the study of the thousands of criminal cases in the appellate reports in the various states. There we may find innumerable examples of judicial and prosecuting practice and malpractice urged upon appellate courts by watchful defense attorneys and in the resulting opinions, placed in permanent keeping for the student of judicial administration. This use of these sources has scarcely been appreciated by legal scholarship which has used them almost exclusively for the equally important but different purpose of studying the growth of legal rules.

There remains, moreover, the task of correlating the data relating to administrative practice with a number of types of social material. Judicial administration assumes varying methods of application in accordance with the social conditions in which it operates. Race, occupation, literacy and other conditions of life bear very heavily upon the problems of law enforcement. As to how much and to what end they condition its application, we still know very little.

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A WORKING THEORY OF SOVEREIGNTY I

IN a recent number of *Economica*[1] Professor McIlwain stirred the embers of the controversy about sovereignty which a few years ago blazed so brightly under the bellows of Professor Laski. It is fitting that students of politics should return to this perennial topic at a time when recent academic teachings are being so fully illustrated in political debate. Within a few months the newspapers have reported that the largest tax-payer of a Massachusetts city claims a personal right to control the expenditure by the city government of the sums which it receives from him in the form of taxes; a prominent corporation lawyer of New York writes in a leading magazine that all citizens are under an affirmative duty to disobey the Eighteenth Amendment to the Constitution and the Prohibition laws; the hierarchy of a great church insists that legislation duly enacted by the law-making organs of an independent republic is nevertheless not law at all; and a veteran American law-writer argues that there are certain subjects as to which there is not, and can never be, any agency anywhere within the American nation vested with valid power to legislate. Amid such items of news the question of sovereignty is of at least unconscious, and perhaps even of direct conscious, interest to practical people not concerned with academic theories. Important issues are seen to depend on what is required to make a rule of conduct truly "law"; on what a state may or may not validly do; on how far an individual may legally define his own relations with the state; in short on the whole group of problems which infest the word "sovereignty."

Sovereignty, like most high-tension political concepts—like "liberty" and "property", for example—has owed much of its potency to the fact that it has lumped together for common effectiveness a number of relatively independent ideas, thereby

[1] *Economica* (November, 1926), pp. 253 *et seq.*

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enlisting for each a considerable measure of support which is meant primarily for one of the others. The natural penalty for this advantage has been that since the concept has come under attack in recent years, it has drawn the fire of every group which has found reason to be dissatisfied with any of its diverse ingredients. This confusion of objectives has brought together into the lists against it a grand alliance of the most motley description, and has flavored the sport of "sovereignty-baiting" with a piquancy and irony not usually exhibited in the controversies of political theorists—an irony inherent in the spectacle of syndicalists and clericals, great industrial corporations and great trade unions, hurrying to align themselves under the same banner. If the energy expended in the controversy is to result in light and not merely heat, it is time to set about unraveling the different ideas which people may or may not have in their minds when they use the word sovereignty. Professor McIlwain's paper makes a welcome beginning in this direction by distinguishing the *legal* concept of sovereignty from some of its non-legal implications.

Sovereignty in the legal sense is after all nothing more nor less than a logical postulate or presupposition of any system of order according to law. A system of law purports to be a body of general rules which produce like decisions in like cases, and are capable of being known with some degree of accuracy in advance. But if there is to be this uniformity in the rules applied throughout a whole community, then there must be a single final source of law which all inferior tribunals and officials within that community are content to recognize as speaking with ultimate authority, and to whose pronouncements they will therefore voluntarily conform, so far as they know how, their own separate acts and decrees.[1]

[1] I hope it will be noted that I do not rest the case for juristic sovereignty on the "imperative" theory of law—i. e., that law is a "command"; I rest it on the need for a single source of authoritative formulation. I believe that this is the sound element underlying the thought of many theorists who have stated their views in the questionable form of the imperative theory. Even if law is only a statement or formulation of existing custom, it becomes important to know who may, and who may not, authoritatively state the custom. The

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In the absence of such a center of ultimate legal reference, each tribunal can only be a law unto itself. This must lead inevitably to conflicting rules and conflicting decisions which, *ex hypothesi*, there is no authoritative higher power to resolve. Sooner or later these conflicting rules or decisions are bound to clash when they happen to impinge on the same *res* or the same parties. In such a conflict, each tribunal faces the alternative of either attempting to make its own decision prevail by force or by the threat of force, or else of abandoning the effort to enforce it. Neither horn of this dilemma is compatible with a régime of law and order; whichever is chosen in a particular case, the outcome of that case will be dictated by accident rather than by predictable rule. A reign of anarchy and not of law is thus the necessary consequence of the coexistence side by side of a number of competing authorities subject to no common superior with legal power to define their respective jurisdictions.[1]

It is therefore clear that as a condition of the existence of legal order in a community, there must be somewhere within

difference between law and customary morality is that while the application of the latter can be left to private opinion, the former requires an authoritative agency to select between possible different opinions. See H. Sedgwick, *Elements of Politics* (London, 1891), chap. xiii.

[1] Joseph Story in his *Commentaries on the Constitution,* 4th ed. (Boston, 1873), vol. II, p. 399, quotes with approval the following passage from Paley: "If several courts coordinate to, and independent of, each other subsist together in the country, it seems necessary that appeals from all of them should meet and terminate in the same judicature in order that one supreme tribunal, by whose final sentence all others are bound and concluded, may superintend and preside over the rest. This is necessary for two purposes: to preserve a uniformity in the decisions of inferior courts, and to maintain to each the proper limits of its jurisdiction. Without a common superior, different courts might establish contrary rules of adjudication, and the contradiction be final and without remedy. . . . A common appellant jurisdiction prevents or puts an end to this confusion. For when the judgments upon appeals are consistent (which may be expected when the same court is at last resorted to), the different courts from which the appeals are brought will be reduced to a like consistency with one another. Moreover, if questions arise between courts independent of each other concerning the extent and boundaries of their jurisdiction, as each will be desirous of enlarging its own, an authority which both acknowledge can alone adjust the controversy." William Paley, "Moral and Political Philosophy," in *Works* (Philadelphia, n. d.), Bk. VI, chap. viii, p. 130.

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the community not merely an organ or system of organs with supreme power to choose between competing rules of law and to place its stamp of validation upon the one which is to be authoritative, but also a like agency for delimiting the boundaries between the competing jurisdictions of all inferior officials and tribunals. Only so can government prove efficient as an instrument for settling and adjusting human differences rather than for multiplying them by introducing an added element of conflict and uncertainty. The entire governmental mechanism, if it is to perform its function, must, in other words, be headed up into a central system of ultimate authority vested with the power to keep subordinate agencies from trespassing on one another's fields—and since this delimitation of jurisdictions is the same thing as a determination of legal rules to govern the exercise of authority by different subordinate agents, the system of ultimate authority for the delimitation of jurisdictions must be identical with that which exists for the purpose of lawmaking.

The *legal* doctrine of sovereignty can therefore be summed up as fundamentally nothing but a demand for the unified organization of authority within the community in order to provide the necessary basis for a system of legal order.

It was this *legal* form of the doctrine of sovereignty which earliest emerged, and which made sovereignty a fundamental concept in political thought. It was the answer of an advancing civilization to the unbearable legal confusion of the Middle Ages. That confusion was due to the continued coexistence, everywhere in the European community, of several rival overlapping claimants for the right to declare and enforce the law with finality. Sometimes there may have been as many as five such claimants functioning at one time and place, but almost everywhere there were at least three—the feudal baron, the king and the church. Each had its own system of law which it was striving to make independent of, and if possible supreme over, the law of the others.[1] From the middle of the twelfth

[1] Jean Baptiste Brissaud, *History of French Public Law*, trans. by James W. Garner (Boston, 1915), secs. 210-220, 401; G. Hanotaux, *La France en 1614* (Paris, n. d.), pp. 158-188; Henry Hallam, *State of Europe during the Middle Ages* (New York, 1904), vol. I, pp. 469 *et seq.*; W. S. Holdsworth, *History of English Law* (London, 1903), vol. I, pp. 356-358.

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century onward it was quite clear to lawyers that there could be no legal order in Europe until for a given area there was somewhere one and only one ultimate authoritative source of law and center of legal reference; and a sense of this need lay behind the papal claims of Innocent III precisely as it lay behind the imperialist polemic of Dante.[1] But at the end of the story it was neither emperor nor pope nor the barons who won, it was the kings; and with the triumph of the kings came the word sovereignty to crystallize what had been achieved.

It should now be clear why "sovereignty", and all the problems which the word connotes for us, were so conspicuously absent from the political speculations of classical antiquity; it was the answer to medieval conditions and medieval difficulties. The classical world took the unified organization of political authority for granted. When the medieval overlapping of authorities smoothed itself out at the end of the fifteenth century into a pattern of territorial nation-states, the result may fairly be described as the emergence of sovereignty in the sense of a single definite organ or organization within each territorial community having final authority to define and pronounce the law therein, and having likewise final authority to adjust rivalries and allot jurisdictions among all minor law-enforcement agencies. This is certainly the core of Bodin's conception of sovereignty,[2] and is the archetype and parent cell of all subse-

[1] "It is self-evident that between any two princes, neither of whom owes allegiance to the other, controversy may arise, either by their own fault, or by the fault of their subjects. For such [a case] judgment is necessary. And inasmuch as one owing no allegiance to the other can recognize no authority in him (for an equal cannot control an equal), there must be a third prince with more ample jurisdiction, who may govern both within the circle of his right." Dante, *De Monarchia*, trans. by Aurelia Henry (Boston, 1904), Bk. I, chap. x, pp. 29-30.

[2] "It is necessary that those who are sovereigns should not be subject to commands emanating from any other, and that they should be able to give laws to their subjects, and nullify or quash disadvantageous laws for the purpose of substituting others; but this cannot be done by one who is subject to the laws or to those who have a right of command over him." Bodin, *Six Livres de la République* (Paris, 1577), Bk. I, chap. viii, p. 96. "The sovereign prince must have the power to change and correct the laws to fit the occurrence of specific cases, as was said by the jurisconsult Sextus Caecilius, even as the master pilot

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quent developments of the idea. I shall refer to it hereafter as the *juristic conception of sovereignty*.

The earliest extension of the juristic conception of sovereignty, and the one which shows the least essential departure from the parent idea, is the conception of *sovereignty in international law*. Within each community where there is sovereignty in the juristic sense, there is a self-contained system of positive municipal law. There are as many isolated, separate, and complete systems of such law existing side by side in the world as there are different communities each possessing a sovereign organ. Within each of these juristic systems there is no room for the independent operation of the other kind of law which we call international. Its function is to operate from the outside, upon and between these otherwise separate and complete systems.[1] It therefore becomes vital to determine where each system terminates—what it embraces, and what lies outside of it. Now a system of positive municipal law is coextensive with the area of authority of a sovereign law-declaring organ, and therefore no subdivision of such an area can form a separate member of the family of nations under international law. This is what is basically meant by the doctrine that the legal persons of international law are sovereign states. Bodin's contribution was as fundamental for international law as for the theory of politics.

At this point must be noticed, however, the introduction into the concept of sovereignty of an element of far-reaching confusion through the formula often used to describe it. The sovereign, it is said, being the ultimate law-giving authority, must be an absolutely independent and supreme "power"; and then resort is had to the language of a crude psychology, and it is

must have the helm in his hand to turn it at his discretion." *Ibid.*, p. 104. *Cf.* Grotius: "In political government we cannot have an infinite gradation of superiors, we must stop at some person or body whose transgressions, having no superior judge, it is the province of God alone to correct, as He Himself declares." *De Jure Belli ac Pacis*, Bk. I, chap. iii, sec. 8, par. 14.

[1] John Bassett Moore, *Digest of International Law* (Washington, 1906), vol. I, sec. 3; L. F. L. Oppenheim, *International Law* (London, 1912), vol. I, pp. 288-293, 344; J. Lorimer, *Institutes of the Law of Nations* (Edinburgh and London, 1884), vol. II, p. 131; G. Jellinek, *Oeffentliches Recht*, pp. 310-314.

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said that the sovereign must "possess a will" which is "not subject in any respect to the will of another." This is a very old form of expression.[1] What it means in international law is obviously no more than that if the governing organ of one community recognizes a legal duty of obedience to the governing organ of another community, the law which connects those two communities is then properly positive municipal law, and, for international law purposes, both can therefore constitute only a single unit, since both in reality form but one legal system. The possibility of much more far-reaching deductions lurks, however, in the words used. Starting from these, which assert that the sovereign organ, to be such, must be absolutely independent, and possess a will not subject in any respect to the will of another, suppose now that the ultimate law-declaring agency, or sovereign organ, of a community, is, like the lower house of the British Parliament, recruited by popular election, and can accordingly be held responsible at the polls to the body of the people—can an organ subject to any such responsibility be said to possess a will not subject to the will of another, as it is required to do by the definition? If not, can it then be said to be a sovereign organ? Or must we not rather say that in such a case it is not the ultimate law-declaring organ, but its master "the people", that is truly sovereign?

Thus emerges the concept of so-called *popular sovereignty*, a concept no doubt in great measure induced by psychological imagery and language about "supreme power" and dependent and independent "wills". The argument that an ultimate law-pronouncing organ is not sovereign if elected by the people, because therefore dependent upon their wills, goes back to Bodin.[2] Before pursuing its consequences it is desirable to examine what may be said against it.

[1] It goes back at least to Grotius: "That power is called sovereign whose acts are not subject to the jurisdiction (*juri*) of another, so that they can be rendered void by the discretion (*arbitrio*) of any other human will." *De Jure Belli ac Pacis*, vol. I, chap. iii, sec. 7, par. 1. This statement, it will at once be seen, has not the extreme implications of some of its modern counterparts.

[2] "The people does not disseize itself of sovereignty when it establishes one or more deputies with absolute power for a limited period of time; which is

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It is undeniable that from the standpoint of a loose and unanalyzed conception of general "power" an organ which is removable by the people is not "ultimate", in the sense of "absolute", as it would be if it were irremovable. But does the absence of ultimate or absolute "power" in this loose and unanalyzed sense necessarily prevent such an organ from being the *ultimate law-declaring agency* in the community? Suppose that in a given instance such an elective legislative organ enacts a statute declaring the law to be X. The electorate disapproves, refuses to re-elect the members at the next election, and returns an entirely new membership. The legislative organ, functioning through this new membership, reflects the desire of the electorate, and repeals the offensive statute. It will be noted at once that the repeal takes place, and can only take place, *through the action of the legislative organ itself*, no matter how much it may have been in fact "caused" or "motivated" by the wishes and "power" of the "people". Until the legislative organ, in other words, passes the repealing act, the offensive statute remains law just as much as ever, irrespective of the wishes of the people; for the only lawful way in which the people can exert their power and give effect to their dislike of the statute is through the orderly action of the legislative organ.[1] Under such circumstances it seems clear that we must say that it is the action of the legislative organ and not of the people which makes or changes the law,—which draws the line between what is law and what is not. The people have a way, to be sure, of making their wishes important to the legislative organ; but whether or not that organ will attach import-

much more than if the power were revocable at the pleasure of the people without the time being fixed in advance. In neither case has the power thus established anything which it can properly claim as its own, and it remains *accountable* for the administration of its charge to the source from which it holds the power of issuing commands; which is not true of the sovereign prince who is not held to render account to any save God." *De la République*, Bk. I, chap. viii, p. 91.

[1] The contrary was in substance maintained by the plaintiffs in error and rejected by the Supreme Court in Luther *v.* Borden, 7 Howard 1. See Charles Warren, *The Supreme Court in United States History* (Boston, 1922), vol. II. pp. 463-465.

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ance to them, rests within its own choice; and if it does not choose, the will of the people remains unfulfilled in the law.

Much confusion has been created by using the word sovereignty to designate the practical leverage which the electorate, in the manner just described, has over an elective legislative organ. Yet in spite of the confusion, the use of the word in this sense is historically not difficult to explain. It is the product of the political struggles of the seventeenth and eighteenth centuries, precisely as the juristic conception of sovereignty was the product of the struggles of the fifteenth and sixteenth centuries. These earlier struggles had achieved juristic sovereignty only because they had made the king politically absolute; and therefore no distinction was drawn by writers like Bodin between juristic sovereignty and royal absolutism. Sovereignty was identified with the extremely broad and loose concept of "supreme power"; and this was exactly what the "people" during the next two centuries thought that they were striving to take away from the king and vest in their own hands. Accordingly the conflict came to be described as a struggle for "popular sovereignty"; and when it was successful, and the responsibility of governments to the "people" had been established, "popular sovereignty" became the conventional word to express the result.

It was "sovereignty" in this sense which Bryce and Dicey sought to distinguish from juristic sovereignty by calling the one "practical" or "political," and the other "legal".[1] Pro-

[1] Bryce, *Studies in History and Jurisprudence* (Oxford, 1901), vol. II, pp. 511-515. Dicey drew the correct distinction: "The electors can in the long run always enforce their will. But this is a political, not a legal fact." *The Law of the Constitution,* 8th ed. (London, 1915), p. 71. Austin confused "political" with "legal" sovereignty, e. g. in his *Jurisprudence,* 4th ed. (London, 1873), vol. I, p. 253, where he made the electorate a part of the British sovereign. This is no doubt a relic of Bodin's doctrine of "accountability," and of the resulting confusion of sovereignty with "ultimate power." For a sound discussion, see Ritchie, "On the Conception of Sovereignty," in *Annals of American Academy of Political and Social Science* (January, 1891). Professor Willoughby has well said, "It seems unfortunate that the same term, 'sovereignty' should be applied to two forces so radically different, even though distinguishing adjectives be prefixed. Is it not better to term such extra-legal force simply 'Public Opinion' or 'General Will,' and to limit the word 'Sovereignty' to its purely legal application?" *The Fundamental Concepts of Public Law* (New York, 1924), p. 112.

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fessor McIlwain performs a welcome service in insisting that the two ideas are quite distinct, and directed to altogether different problems.[1] Juristic sovereignty denotes only the existence of a definite organ for drawing the line between what is and what is not law. Political sovereignty has reference to the forces, or rather to some of the forces, which operate on the juristic sovereign to determine it where to draw this line. For after all, the political motive, i. e., the fear of not being re-elected, is but one of a number of factors which may and probably will influence the minds which compose the sovereign organ when they set about to define the law. It is conceivable that they may also be influenced by friendship, bribery, or a heroic desire to become political martyrs for a sacred cause. Surely no one would say that the presence of some or all of these motives, however decisive, would serve to deprive of sovereignty a body by whose act that which was not law became law, and that which was law ceased to be so.

It would be absurd to call a psychological motive sovereign; yet we should have to commit that or other equal absurdities, if we were to use the word sovereign to designate a first cause in a chain of factual causation, rather than the articulate mouthpiece of the rules which we call laws. We might, for example, be asked to say in a case where a sovereign organ consisting of five members was evenly divided between two opinions with the fifth member holding the balance, that only the latter individual was sovereign. To speak in this way is either to confuse distinct ideas, or else to borrow the word sovereignty from an idea which needs it badly, for a different idea which is so amorphous that it is hardly helpful to have a technical word for it at all. History and experience suggest, on the other hand, that we are greatly in need of a word to designate the definite organ or funnel through which the forces of fact, motive, power, desire, transmute themselves from ineffective formlessness into the form of the specific rules which we wish to distinguish from other kinds of rules by calling them rules of law. Insofar as the word sovereign expresses the idea of this definite

[1] *Economica* (November, 1926), p. 256.

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funnel or organ, it is a helpful part of a political vocabulary; but if it is to continue to be helpful, it must be kept clear of confusions which warp its meaning. One of these lurks in the word "ultimate". The legal sovereign is the ultimate source of law, not in the sense of being an uncaused cause, or an unmotivated author, but in the sense that only that which passes through it has the force of law, and only after having passed through it and received its stamp of validity. This being understood, it becomes clear that the sovereign may be influenced, as it certainly will be, by political or moral or physical motives and forces of any or every kind without in the least degree losing its claim to be called sovereign. A judge may create a precedent because he has eaten too heavy a meal, or because he was once attorney for a railroad company, or because he is anxious to be re-elected, without its ceasing for any of these reasons to be a precedent; it is a precedent because it has emanated from a judge acting in his judicial capacity. The same thing is true of the act of a sovereign organ.

The importance of thus ear-marking the ultimate lawgiving organ by attaching to it the word "sovereign" springs from the importance of keeping the idea of "law" distinct from the other kinds of rules and imperatives which have an influence upon human conduct and relations. The need for such a distinction arises from the fact that men recognize and obey in greater or less degree a large number of different kinds of rules of conduct emanating from different sources. Thus most men regard as imperative the social conventions which are in vogue among their class and generation, as for example dueling was in vogue among the gentlemen of Europe in the eighteenth century. Again, many men regard as imperative the rules of behavior prescribed by the religious organization to which they belong. Once more, men ordinarily accept as imperative the ethics of the business or industrial group of which they are members. There is no inherent reason why the term "law" should not be applied to any of these three sets of rules. It is clear, however, that if all three sets emanate, as they actually do, from wholly independent sources, there will inevitably be contradictions and conflicts between their pre-

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cepts, as for example between the social convention and the religious precept on the subject of dueling. In case of such a conflict, both inconsistent rules cannot be called "law" without doing violence to the word and restoring the medieval régime of competing laws, for both cannot be equally obligatory, and no unified system comprising both can be worked out as a guide for future conduct. Either one set of rules must be accepted as of supreme validity in cases of conflict, in which event this particular set will alone be entitled to the name of "law", or else there must be some fourth set, emanating from an independent and still higher source, which will override all three and resolve their contradictions. In actual fact such a higher source of precepts is at the present time the political organization, or "state", which comprehends all narrower and more specialized groups and centers of authority in the community, and which exists primarily for the purpose of reconciling their competing claims and interests for the common advantage.[1] If the state, rather than the church, is recognized as the ultimate group in this sense, then it is the rules promulgated by the state organization which must take precedence over the conflicting rules of any other group, and which, being thus authoritative, are alone entitled to be called laws in the strict sense. If, on the other hand, the church is recognized as the ultimate group, then the rules prescribed by the secular authority must yield in case of conflict to the rules promulgated by the church organization, and these will be properly held to possess legally binding authority. The point is, that *juristically* it makes no difference what particular organization is recognized as having ultimate law-making authority, so long as one and only one such organization is recognized within the community, in order that all the rules entitled to be called "laws" may form a harmonious and unified system. We

[1] "The co-ordination of functions is the sphere in which, to that end, the State must operate. . . . . Clearly a function of this kind . . . . involves a pre-eminence over other functions. . . . To satisfy the common needs, it must control other associations to the degree that secures from them the service such needs require." Harold J. Laski, *A Grammar of Politics* (New Haven, 1925), pp. 69-70.

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can then tell whether or not a rule is "law" by discovering whether or not it emanates from this single supreme system of organization; and the term "sovereign" is useful to designate this authoritative source of law in distinction from the sources of other non-legal rules. It would be a pity to waste the term upon the actual forces or motives which induce the sovereign, whoever he or it may be, to adopt one rule rather than another. The study of those forces is, to be sure, a most important and vital part of politics; but there is no reason to confuse it with the special problem to which the term sovereignty is conveniently adapted.

If, then, the term sovereign is appropriated for the use of the political, or supreme coordinating organization within the community (in distinction from the other organizations which create the need or furnish an occasion for the exercise of its coordinating activities), a long step is taken toward defining one of the prerequisites of a régime of law and order. But a further problem of much difficulty is presented by the complex nature of the organization of most modern states. In very few of these is the function of drawing the line between what is and what is not law entrusted to a single definite governmental organ, individual or corporate. This simple situation happens to have existed in Great Britain since the Parliament Act of 1911, but it only serves to emphasize by way of contrast the condition of affairs prevailing in complicated federal states like the United States or Germany. Can we say that under such governments as these there is any sovereign organ within the political organization or state? Laborious searches by jurists for the "location of sovereignty" in such states have led to results so unrealistic and weird as to bring discredit on the whole theory of sovereignty. Therefore some writers have abandoned the attempt altogether, and have contented themselves with vesting sovereignty not in any particular governing organ or organs, but in an abstract entity called the state. There thus comes into existence what is known as the theory of *state sovereignty*.

The theory of *state sovereignty* seems to have been in part engendered by special political conditions existing in Germany

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in the nineteenth century,[1] and to have also resulted in part from a logical extension of international law concepts. There is no harm in conceiving sovereignty as thus attached to the "state" provided we know what we are about when we do so. Properly understood, the statement is little more than a tautology. For if the state is the community politically organized—i. e., organized for the purpose of coordination between individuals and between other types of organization, and if it undertakes to perform this task by means of laws, then the state is that particular organization of the community whose function requires that it must ultimately be in a position to say what is, or what shall be treated as law. If sovereignty is then defined as the function of drawing the line between what is and what is not law, obviously sovereignty is by definition a function of the state organization as distinguished from other forms of organization,—for example, from purely economic or religious organizations,—so long as the political organization is not merged in identity, as conceivably it might be, with one of these latter. Even in the event of such a merger, the latter organization would really be what we now call the state, though under a different name, and though much else besides, and sovereignty would thus still remain a function of the state.

In taking refuge in the abstract statement that sovereignty "belongs to" the state, we are not, however, relieved from the necessity of saying that it must be "exercised through" an organ or organs of government.[2] All that we really mean when we speak of sovereignty as belonging to the state is that the state or law-making *organization* is the authoritative source of the laws governing all other organizations and types of organization, and in this respect is superior to or supreme over them. This authority must of course be exercised by some

[1] C. E. Merriam, *History of the Theory of Sovereignty since Rousseau* (New York, 1900), pp. 85 *et seq.*

[2] Stahl pointed out that our interest is in isolating and identifying the *definite organ* to which the other organs are subordinated. "Die Frage ist eben wer das Oberhaupt des Staates, wer das Centrum in den Functionen des Staates ist, und da kann man doch nicht antworten, der Staat." F. J. Stahl, *Philosophie des Rechts* (Heidelberg, 1856), vol. II, "Rechts und Staatslehre," pt. II, p. 536, note.

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specific law-making organ or system of organs. The problem of the "location" of sovereignty therefore still remains; and meanwhile the theory of state sovereignty through its abstractness is subject to the very real danger of being made the premise of false deductions.

The danger in the formula that sovereignty belongs to the state arises from the temptation to adopt the loose definition of sovereignty as "supreme power" or "supreme will," and then to hypostasize the state into an independent entity endowed with this will and separate from the community, instead of regarding it as only a particular form of organization, albeit the "supreme" organization, of the community. This is a very natural development from international law concepts. In international law the term state is used to mark out a separate entity, among a number of such entities, as a "legal person," which is treated by the law as a subject or object of rights and duties, and is therefore metaphorically described for legal purposes as acting and willing. This manner of speaking, proper enough in its place, has not unnaturally caused the state to be conceived as "really" a "person," and as therefore endowed in fact no less than for the conventional purposes of law with the physical attributes of will and activity. After an abstract being of this character has once been conceived, logic has a tendency to take the bit in its teeth and drive straight toward a *reductio ad absurdum*. Just as the state is personified by international law in its relations with other states, so internally it is conceived as standing personified in distinction from all natural individuals and groups within its own borders.[1] These include, however, the officials and instrumentalities of government; and therefore the state may, nay indeed must, be an empty entity separate from and independent of its government on the one hand as well as of the body of its people on the other. Cut loose in this way from all reality, and regarded as vested with a "supreme" or unmotivated will, a metaphysical juggernaut has been brought into existence which can be demonstrated by formal logic to

[1] F. A. Schelling pointed out that sovereignty could only be attributed to the state "für die Verhältnisse eines Staates nach aussen hin." *Lehrbuch des Naturrechts* (1850-63), pt. II, pp. 56 *et seq.*

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have no possible end but its own abstract existence, which can be regarded as serving no purpose but its own self-preservation and aggrandizement, and which can by definition be subject to no limitation or control.[1] This conception in international relations leads by strict logic to the conclusion that it is and must rightly be of the essence of every sovereignty to exterminate every other. Within any particular state it leads to the conclusion that the whole force and activity of the state must be motivated with sole reference to external aggrandizement.

These mischievous logologies have nothing whatever to do with the essential doctrine of sovereignty. They result from assuming that what is a legal postulate for some purposes,—e. g., the possession by the state of legal capacity, or "will"—must be a physical fact for all purposes. They involve a complete neglect of the concrete realities which make it plain that the state is not a self-existent entity, but only an organization or system of organs enabling the community to perform certain functions,[2] and that sovereignty is only the function of making a division between two different kind of rules, those which are to operate in such a way that we call them laws, and those which do not. This function cannot be performed by an abstract "state," but only by a concrete organ or organs of government.

In looking about for these organs under a complicated form of government, the problem loses much of its difficulty if we recognize that sovereignty can be exercised by a system of organs properly geared together no less than by a single organ. In an absolute personal despotism there is no doubt as to the location of sovereignty. But the problem begins to be complicated when the absolute sovereign is not an individual but a collegiate or corporate body. Suppose it is an assembly having

[1] "The highest duty of the state is to uphold its power, ... to maintain itself." Treitschke, *Politik*, vol. I, pp. 100-101. "In the process of world-history there is nothing above the state; therefore it cannot sacrifice itself for anything higher." *Ibid.*, p. 101.

[2] Willoughby, *op. cit.*, pp. 49-51. *Cf.* R. M. MacIver, *The Modern State* (Oxford, 1926), p. 5.

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a quorum of eleven members and acting by majority rule. The exercise of sovereignty in this case requires the cooperative action of a number of individuals according to a particular pattern—requires the action of eleven members in such a manner that six or more declare themselves in agreement. A still more difficult case is one in which sovereignty is exercised, as in the British Parliament, by a body consisting of two corporate bodies. Here an exercise of sovereignty requires the action of each of these two bodies in a special way. These simpler cases should remove much of the difficulty involved in understanding the operation of more complicated governments, as for example, that of the United States. Here the sovereign consists not of two organs but of a whole system of organs, geared together into a complicated working pattern. It includes first of all the national and state legislative bodies, including the President and state governors because of their veto and discriminating power. These are elements in the system of sovereignty because their enactments unless brought into question in the manner hereafter described are recognized as laws,—i. e., as vested with proper legal authority. But means are provided for raising the question of whether or not these enactments are validly legal. This question is left to a system of courts, heading up ultimately into the United States Supreme Court, which tests the validity of legislative enactments by interpreting them and then comparing them as so interpreted with the interpretation which the court places upon a supreme law or constitution. For the creation or change of this supreme law there exists another system of organs vested with the power of constitutional amendment.[1] Should the Supreme Court declare a law unconstitutional, it remains open to the amending power to reverse this result by so changing the Constitution as to bring the law into conformity therewith. But even in case this is done, the last word remains with the Court through its power

[1] "It may be that, as in the United States, certain organs of government, such as constitutional conventions, are but seldom employed. But when they do function for the creation, either of State or Federal Constitutional Law, they are as much parts of the government as are any other of the permanent portions of the State's governmental system." Willoughby, *op. cit.*, p. 50.

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to establish authoritatively the validity and meaning of the amendment.

Such a complicated system of sovereign organs seems far removed from the neatness and simplicity of Bodin's idea,—so far removed that it may at first sight be thought to be in absolute contradiction to it; for does it not amount to "dividing" sovereignty and thereby creating the possibility of a conflict between the parts, and so of two or more competing sets of contradictory legal precepts? This result does not follow because all the organs of the sovereign power function as parts of a single system with an ultimate organ, the Supreme Court, to define authoritatively the sphere of each and to restrain each within its sphere. It is the presence of such an organ with ultimate power to pass authoritatively upon questions of disputed competence which binds the multiplicity of law-pronouncing organs into a single unified system and preserves sovereignty by making it possible to secure a final authoritative determination of what is and what is not law.

A last source of confusion in the concept of sovereignty arises from a failure to recognize the essential difference in nature between international and positive municipal law. So far, in using the term "law," we have been referring solely to the latter. It is of the essence of positive law to impose upon human individuals and other legal persons binding legal obligations irrespective of whether or not these obligations are accepted by the persons upon whom they are so imposed. Now if we conceive international law as similarly imposing a legal obligation from an external source upon states possessing sovereignty, it would no longer be possible to define sovereignty as the function of ultimately declaring what the law is; for conceivably international law might impose upon a state the obligation to refrain from enacting certain rules of municipal law, e. g., laws against immigration; and if this international law obligation were regarded as having the same kind of binding effect as an obligation of positive law, it would operate, as would a constitutional limitation, to render null and void *ab initio* a rule of municipal law at variance with it, in spite of the fact that the latter rule had been duly promulgated by the sover-

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eign. We should then either have to say that sovereignty belonged to the source of the international law rule as contrasted with the source of the municipal rule, or else admit that we were faced with a conflict between two opposing rules both claiming validity, i. e. with precisely such an absence of sovereignty as existed in the Middle Ages. In either case we should deprive the rule of municipal law involved in the conflict of an assured title to be considered legally authoritative; we should bring into doubt the question of which law was really law, and thus destroy the basic prerequisite of a régime of law. This would be particularly true, so long as there exists no definite authoritative organ for the promulgation of international law; for in the absence of such an organ every individual is at liberty to insist on his own interpretation of international law, and would therefore in the situation suggested be entitled to deny the legality of any rule of municipal law on purely legal grounds without being subject to refutation from any certainly authoritative source. On the other hand, were an authoritative central agency for declaring international law to come into existence, we should have to say either that this agency was vested with juristic sovereignty over the whole world,[1] or at least that a conflict of legal authorities was set up such as existed between the central authority of the king and the local authority of the barons during the Middle Ages.

These results, all of which are fatal to the existence of a régime of law, are avoided if we recognize that international law in its present stage of development is law in a different sense from positive municipal law. From this standpoint, international law can be conceived as deriving obligatory validity only from acceptance by every sovereign. Each sovereign thus remains completely an ultimate law-declaring agency, since the

[1] Some of the earlier writers on international law admitted the need for a single central source of international law if it was to be considered as "positive law"; but they found a way out of the difficulty by making God this central source. See J. J. Burlamaqui, *Principes du Droit Naturel,* pt. II, chap. vi, sec. 8; Sir R. J. Phillimore, *Commentaries on International Law* (London, 1854), vol. I, Preface. This is essentially the position of Suarez at the beginning of the seventeenth century. Vattel sets up "nature" as sovereign, *Law of Nature and Nations,* prelim., secs. 7-10.

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rules of international law as well as its own municipal law require its stamp of validation, and are in the last analysis for its determination. This is fully recognized in the case of all conventional international law rules,—i. e., rules introduced by treaty. Such rules are binding only on the signatory powers. The same view is adopted in the case of those rules of international law which are capable of being applied within a sovereign state through the agency of its municipal courts. Here also it is recognized that such rules derive their validity entirely from acceptance by the sovereign.[1] The same theory underlies any project of international codification or even of an international common law to be built up by the decisions of a central world court. A general international code would require adoption by every sovereign state before it could become universally binding, and there is no doubt that any sovereign state could legally withdraw from its operation. Similarly a sovereign state could legally at any time withdraw from the obligatory jurisdiction of a world court. The fact that international law is ultimately a matter for the determination of each sovereign state is shown on the one hand by the absence of any way to prevent every such sovereign from adopting its own rules on a subject like contraband, and on the other hand by the practical power of every sovereign to legally denounce its treaties under the implied *rebus sic stantibus* clause.[2] Can we say that so-called customary international law, unlike conventional international law, is binding on a sovereign state without its consent?

Is there a sense in which sovereign states are subject to international law rules which they repudiate? If this is not the case, how may we say that there can be a violation of international law? Only if we realize that we mean something dif-

[1] The Charming Betsey, 2 Cranch 64; The Nereide, 9 Cranch 688; The Lottawanna, 21 Wall. 558; Queen *v.* Keyn, L. R., 2 Exchq. Div. 63; Willoughby, "The Legal Nature of International Law," in *American Journal of International Law*, vol. II, pp. 357 *et seq.* "International law is positive law only to the extent to which in virtue of its adoption by municipal systems, it ceases to be international." Lorimer, *op. cit.*, vol. II, p. 189.

[2] For the best discussion of this point, see C. C. Hyde, *International Law* (Boston, 1922), vol. II, pp. 88, 545; also Lorimer, *op. cit.*, vol. I, pp. 46 *et seq.* For an attempt to escape the difficulty, see Fauchille, *Traité*, secs. 853 *et seq.*

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ferent from what we mean when we speak of a violation of positive municipal law. We cannot mean a violation of a rule emanating from an external source which the culprit state is authoritatively bound to obey. We can only mean a violation of a rule which we have good grounds for thinking that common sense, traditional practice and good faith require should be observed. But who is to judge whether there is such a rule, and if so, how it is to be interpreted, and what conduct it prescribes? In the absence of a definite treaty stipulation on the one hand and of an agreement for arbitration on the other, these questions can only be for the decision of different private individuals or "experts," well or ill-informed as the case may be, who are interested enough to discuss them. Is such a rule anything more than a mere "moral rule", deriving its authority only from individual opinions as to its good sense and the good sense of those who advocate it?

I think we must answer to this question both yes and no. A rule of international law is certainly not law in the sense of a rule of positive municipal law;[1] in comparison with a so-called "moral rule" it displays certain similarities and certain important differences. Like a moral rule, it is not the pronouncement of any definite law-giving organ whose stamp is essential to guarantee its validity. Unlike a moral rule it rests its claim to authority not upon private experience and value-judgments, but mainly upon its conformity with a mass of precedents, ad-

[1] The historic controversy as to whether international law is "really" "law" is almost wholly a controversy about words. On the one hand, it cannot be denied that there are important differences between international law and positive municipal law. It is equally impossible to deny that there are certain basic identities between them. The important thing is to discover what these identities and differences are, not whether they can be obscured by applying the same term to both types of jurisprudence. We may, if we so desire, claim that, because of the absence of physical sanctions, international law represents a higher type of law; but we must recognize that it represents a different type. This is the position of Professor Philip Marshall Brown: "The law of nations is of a distinctly different character from municipal law. It may truly be affirmed that the *lex gentium* is of a more elevated nature. Applying as it does *inter gentes,* it does not appeal to the policeman; it appeals to reason itself, to the sense of equity, to a higher moral consciousness. . . . It is simply the recognition of mutual interests, of common legal rights and obligations." *International Realities* (New York, 1917), p. 104.

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judications and other rules resting upon a similar basis. It is thus likely to be far more precise, certain and juridical in its content than a mere "moral" rule. It is precisely the kind of rule which, if once selected from its possible variants and adopted by a sovereign, becomes a rule of positive law. It lacks only this stamp of authoritative approval to single it out from its competing variants and make it law in the positive sense. But in the absence of such validation, it remains permanently within the sphere of differences of opinion, and there is no agency authorized ever to inform us definitely whether for the future it, or some other rule, is to be considered as binding.[1]

It is quite true that systems of positive law have often originated from a body of rules of essentially the same character as current international law. Before juristic sovereignty was

[1] Therefore Professor Brown says that, "The establishment of an international tribunal as the supreme court of appeal when doubts arise concerning the interpretation of these laws (i. e., rules of international law) is of course a logical necessity. It is by no means clear, however, that such a tribunal should possess coercive power." *Op. cit.*, p. 105. This need for an authoritative organ to pronounce what the law is, with finality, is not regarded as essential by Dr. David Jayne Hill; he is satisfied with merely insisting that law can be law without coercive sanctions: "In determining what the law is, it is not necessary to find a rule that is certain to be enforced; for under the most perfect governments it is sometimes impossible to enforce the law. . . . The one essential characteristic of a jural law is, that there exist a general consent to its enforcement. If the idea be not definitely expressed, the reason is to be found in the indefiniteness of the idea itself; for jural law is by its nature a matter of opinion. When we go to a lawyer to find out what the law is, he gives us his 'opinion'. When the judge has decided the case against him, it is by authority of his 'opinion', which in turn may be reversed by the 'opinion' of a higher court. What all agree may be enforced is undoubtedly the law, whether it is known through prevailing custom, explicit legislation, or the decision of a judge." *World Organization and the Modern State* (New York, 1911), p. 121. Twiss makes the peculiar argument that international law is positive law because it is physically enforced by the action of the individual nations: "The history of the European law of nations shows that the more powerful nations have, as occasion required, used their individual strength to enforce its rules, and that the less powerful have combined their forces from time to time and by their united strength, compelled the more powerful states to respect them. . . . Wherever a rule of conduct is thus capable of being enforced it ceases to be a mere rule of morality, binding on the conscience of men, and may in contradistinction be termed without risk of confusion a rule of law." *Law of Nations in Time of Peace*, 2nd ed. (Oxford, 1884), p. 175.

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definitely organized, there was custom, precedent, informal and occasional adjudication.[1] It is therefore just to recognize a close kinship between international law and the early stages of positive law;[2] the international law of today may well be the "positive" international law of some future day in the making. But before this can happen there must occur the unification of the present independent law-making organizations of the world into the same kind of unified system, headed up into an organ of ultimate authoritative formulation, which today exists within the separate sovereignties. Such unification, if it comes, will no doubt require a considerable period of time to establish itself. During that interval the claims of the international organization to sovereignty will have to meet the opposing claims of the present national sovereigns, fighting to maintain their independence, just as during the Middle Ages the sovereign claims of the king had to compete against the inconsistent claims of the barons and the church. During such a period of conflict and transition, if it occurs, there must be ever increasing doubt as to the location of sovereignty,—as to whether it is vested in the national organizations or in the international organization. Such doubt and uncertainty will for the time being reflect themselves in like doubt and uncertainty everywhere as to what system of rules is to be considered as law; and during the interval law will therefore operate only intermittently where one system or the other has for the moment succeeded in making good its claims, to the exclusion of the other. Elsewhere force, uncertainty, and accident will take the place of law. In the end either the international

[1] See L. T. Hobhouse, *Morals in Evolution* (New York, 1921), pp. 92-95, chapter on "Occasional Justice."

[2] This is pointed out by Nys, *Le Droit International* (Brussels, 1912), vol. I, pp. 140-145. Nevertheless it seems an abuse of terms to speak of a positive law as existing before not merely a legislative organ but even an authoritative judicial organ has come into existence. This is the situation today in international law. In primitive law we commonly do not regard the stage of law as having superseded the stage of custom until an authoritative adjudicating agency has been established to declare what is and what is not customary law. This is not to deny an evolutionary relationship between the two stages; it is merely preserving a proper verbal distinction between things that are really different.

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organization will prevail and find itself in undisputed possession of world-wide sovereignty; or else the world will relapse again into its present condition of a number of independent sovereignties whose interrelations are subject only to the kind of rule which we now describe as international law.

This transmigration of sovereignty from an organization of one kind to that of another is a characteristic of the formation of states of the federal type. Sometimes it takes place by a definite voluntary surrender of sovereignty by the smaller units to the central organization. Sometimes it takes place gradually and imperceptibly through a growing acquiescence in, and acceptance of, the claims of the central organization to superior obedience. Sometimes, as in the American Union, it takes place amid the violence of civil war. But always and everywhere it takes place extra-legally; as Kant perceived,[1] there can in the nature of things be no legal way of effecting a transfer of sovereignty from one organ or organization to another. The very presuppositions of a system of law require that only one such system should be conceived as existing within a given area at one and the same time; and such a system requires that so long as it exists sovereignty must be vested in one and only one organization.[2] The transfer of sovereignty to another and

[1] "When on the success of a revolution a new Constitution has been founded, the unlawfulness of its beginning and of its institution cannot release the subjects from the obligation of adapting themselves to the new order of things:" for "the origin of the supreme power is practically [i. e. legally] inscrutable by the people who are placed under its authority. . . . It may be otherwise rendered thus, 'It is a legal duty to obey the law of the existing legislative power, be its origin what it may.'" Kant, *Philosophy of Law,* trans. by W. Hastie (Edinburgh, 1887), pp. 174-175, 181. This naturally is the obverse of the proposition that "it would be a manifest contradiction that the constitution should contain a provision legalizing the right of rebellion. That would be to legalize the overthrow of the subsisting constitution from which all particular laws arise, which would be absurd. . . . . Such a constitution would be contradictory for the reason that it would necessarily have to include a publicly constituted counter power which consequently would be a second sovereign in the State, and the existence of this second sovereign would likewise require a third whose function would be to decide between these two." Kant, "The Principles of Political Right," in *Eternal Peace and Other Essays,* trans. by Hastie (Boston, 1914), pp. 48-49. See also Willoughby, "Juristic Conception of the State," in *American Political Science Review* (May, 1918), pp. 192, 200.

[2] "Judicial power presupposes an established government capable of enacting

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different organization requires the substitution of another and independent system of law having a different source. This change cannot take place legally,—i. e., in accordance with law,—unless we suppose the existence of some third and higher system of law emanating from a still higher sovereignty; and so on, *ad infinitum*. The shift must therefore take place extra-legally, as a matter of lawless fact rather than in conformity with legal rules.

It is therefore manifest that there will from time to time be periods of political development when sovereignty will be in abeyance; when force or compromise will dictate the outcome, not through law and in an orderly fashion, but irregularly and to the exclusion of law. These periods are the great germinal epochs of politics; but they are inevitably periods of disorder and confusion, and commonly also of bloodshed, and accordingly such periods must be occasional and infrequent if progress is to be orderly and if society is to enjoy the advantages of political organization as contrasted with anarchy. Men have not attained the unity of viewpoint, the tolerance of adverse opinion, and the breadth of understanding of the needs of other classes than their own which will enable them to live together fruitfully under a régime of voluntary compromise to the exclusion of positive law. A régime of positive law must therefore be accepted as the normal status of civil society; and a régime of positive law presupposes and requires the existence of juristic sovereignty.

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laws and enforcing their execution, and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived. And if the authority of that government is annulled and overthrown, the power of its courts and other officers is annulled with it. And if a state court should enter upon the inquiry proposed in this case (i. e. whether a revolutionary government was the legal government of the State of Rhode Island) and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question it undertook to try. If it decides at all as a court, it necessarily affirms the existence and authority of the government under which it is exercising judicial power." C. J. Taney, in Luther *v.* Borden, 7 Howard, 1.

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THE ENFORCEMENT OF HOUSING LEGISLATION

THE conditions under which people live have a profound influence upon their health, safety and well-being. For their protection it has been found necessary in urban areas to frame comprehensive laws or local ordinances to govern conditions of construction, fire prevention and protection, light and ventilation, sanitation and maintenance of dwellings, both new and old. In the absence of such provisions or where provisions are inadequate, ignorant or selfish builders will erect houses or tenements which will be poorly constructed and depreciate rapidly, and which may even be structurally unsafe, a pronounced fire-risk, and provide inadequately for light and ventilation of rooms and halls, for privacy, convenience and comfort of the tenant.

Comprehensive housing ordinances have not been passed in American cities, as a rule, until the cities have become fairly large, and adequate legislation was not to be found in any city prior to the beginning of the twentieth century, although quite comprehensive codes were framed in the preceding decades for New York City and several other large municipalities.

The present period of housing legislation dates from the passage of the New York State Tenement House Act of 1901, which applies to cities of the first class—New York City and Buffalo. It was framed chiefly by Mr. Lawrence Veiller, now Secretary and Director of the National Housing Association, and served as a model for housing laws in the rest of the country until the publication by Mr. Veiller of his Model Tenement House Law, and subsequently of his Model Housing Law. The Tenement House Law had covered only such dwellings as were inhabited by three or more families, but the Model Housing Law, first published in 1914 and revised in 1920, covers other types of dwellings as well. Other states, Iowa, Michigan and Minnesota, have adopted the Model Housing Law with very slight changes. The permissive Tenement House Acts

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for cities and towns of Massachusetts show its influence, as do also the state housing laws of California and Indiana. The State Tenement House Act of New Jersey is based upon the Tenement House Act of New York. In practically every other state in the country housing conditions are governed chiefly by local ordinance, although there are some provisions in state health or fire-prevention acts which have a bearing on housing. Many local ordinances have followed closely the Model Housing Law—as, for example, those of Berkeley, Syracuse, Cleveland, Columbus, Louisville and Hartford.

Except in the State of New Jersey and in New York City the administration of housing laws or local ordinances is vested in local building and health departments. The sections on structure, fire protection, light and ventilation, in case of new or remodeled buildings are enforced by the building department, while the maintenance of healthful conditions and sometimes the plumbing and sanitation sections are left to the health department. In the State of New Jersey and in New York City special tenement house departments have been created and charged with the enforcement of the above provisions as far as tenement houses are concerned, leaving the enforcement of similar provisions, insofar as they affect one or two family houses, to local health and building departments.

The advantages of having a uniform state housing act are very great. For a state legislature is more likely to use the services of experts than smaller cities are; and the provisions of a state act may reach not only the large cities but the smaller ones which would, in the absence of a state law, have no adequate legislation on the subject or no legislation at all. Another advantage lies in the fact that a state law is less easily modified than a local ordinance, and cannot be changed without commanding public attention, thus making it possible for specialists and the "guardians of public welfare" to be heard. Whereas, experience shows that local ordinances may be changed at almost any meeting of the city council without a public hearing. The council may be influenced unduly by arguments of unscrupulous builders who are looking for quick profits and who overlook the interests of the tenants and the general public.

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The housing legislation of any given city may include sections of the state housing act supplemented by state fire-prevention or public-safety acts, and possibly, also, as in the case of Wisconsin, the state building code. In addition to the state legislation there may be local building, health, or fire-prevention codes enforced by the building department, health department, and the fire chief or department of public safety.

Enforcement of housing legislation may be inadequate for any of the following reasons:

(1) Because the law is not clear or sufficiently comprehensive, or because the provisions for penalties and procedure are inadequate;

(2) Because the heads of administrative departments lack the necessary qualifications;

(3) Because the appropriations to the enforcing departments are insufficient;

(4) Because of the make-up of the Board of Appeals;

(5) Because of division of authority;

(6) Because of lack of cooperation on the part of the city solicitor and the courts.

To improve the enforcement of housing legislation it is necessary, then, to have an adequate law. The experience of New York City and of the states which have adopted the Veiller Model Housing Law with a minimum of change, such as Iowa, Michigan and Minnesota, demonstrates the importance of the adoption of the many provisions of Article 6, the section entitled "Requirements and Remedies". This section requires the owner or architect to submit his plans to the appropriate department to make sure that they conform to the law. He cannot commence to build until he has received a permit of approval based upon conformity to the law. The second requirement is that the building shall not be occupied until a certificate of compliance has been secured from the appropriate department, and the latter is not issued until the dwelling conforms in all respects to the requirements of the act. Occupation of the building is unlawful until such certificate has been secured.

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Drastic penalties are necessary if the act is to be properly enforced, for otherwise the unscrupulous builder will find that he can make money through violation of the law even though he will be brought to court and forced to pay small fines. The Model Law, therefore, provides for imprisonment as well as fines, and for a cumulative penalty for each and every day that the violation shall continue. Civil penalties are also provided for. To protect the enforcing department it is further provided that no officer of that department shall be liable for costs in any action or proceeding that may be commenced in pursuance of the act. The tenants may be evicted if they fail to comply with the maintenance provisions of the act. All fines imposed under the act shall be a lien upon the property.

The owner of property is required to file with the enforcing department a notice containing his name and address and a description of the property, and is permitted to file his agent's name if he wishes. The posting on the premises of a copy of a notice of violation of the act and the mailing of a copy on the same day to each person whose name is filed with the department constitutes a sufficient service of notice, thus making it possible to secure quick action with respect to the violation. The enforcing officer is granted power to make periodic inspection of dwellings, and is required under the Model Law to inspect every multiple dwelling at least once a year. Right of entry is authorized.

In the absence of any of the above provisions, enforcement becomes difficult. Permits to build and certificates of compliance are indispensable, but follow-up inspection is also necessary in order to prevent the making over of one and two family houses into tenement houses after the certificate of compliance has been granted. Stop orders have proved to be a useful supplementary provision under the New Jersey State Tenement House Act and in the building department of New York City. The posting of a stop order on the premises stating the law and the penalties will keep contractors and employees from working on the building or covering up a violation of the law until the enforcing department can arrange to have the violation removed. Frequent inspection during the period of construction

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is necessary, or otherwise many sections of the law will be violated. The provisions for the registering of the owner's name and for service of summons are necessary, for otherwise ownership may be frequently changed and the owner difficult to reach. Where owners live out of town or are sojourning in Europe (reported by New Orleans and Chicago) dangerous violations of the law would continue over an extended period unless the enforcing department were empowered to make the necessary changes itself and charge them against the property.

Even where the law is good, it may be poorly enforced if there is weakness in the administrative department. The enforcing official should be thoroughly versed in the subjects of building materials and of construction, housing and sanitation, but he should also be a man of courage and integrity, convinced of the seriousness of his civic responsibility and sufficiently forceful to command the respect of architects, builders and owners, and the respect and cooperation of his staff.

With an adequate law and a competent administrator, enforcement, at least of some of the provisions of the act, is virtually guaranteed. But obviously in the absence of a sufficient appropriation many provisions of the law will prove unenforcible. A striking example of this is seen in the State of New Jersey where the appropriation has never been sufficient to cover all the features of the law. The first Commissioner, Captain Allen, who was one of the most competent housing officials we have ever had in this country, finding his appropriation insufficient, used it chiefly to make sure that all new construction conformed to the law, arguing that he was thereby preventing the recurrence of serious housing conditions in all new buildings. But by concentrating on the new buildings, he did not have inspectors enough provided on his staff to make possible periodic inspection of old tenement houses and the removal of violations of the law. It was a wise decision under the circumstances, but left the tenants of the older tenement houses uncared for unless they had the courage to file complaints. Local health departments in New Jersey, as in other states, do not make regular inspection of all dwellings but inspect usually only on complaint—this is due chiefly to

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the fact that they also suffer from insufficient appropriation. So New Jersey's law with regard to the periodic inspection of older properties is still inadequately enforced by either the State Board of Tenement House Supervision or by local health departments.

It is probably safe to say that no American city has an adequate force of housing inspectors. New York City is practically the only one which has ever succeeded in having every tenement house visited at least once a year (and New York stopped doing so ten years ago), though in every city there are many tenement houses and private dwellings which should be visited more frequently. Otherwise rubbish will accumulate which will constitute a serious fire-risk, or defects will occur in plumbing or repair or use of the building, which will menace the health of occupants or neighbors.

In most cities it must be said the training of housing inspectors is poor. They are usually chosen from persons who have taken general civil service examinations, but have not been given adequate tests of their knowledge of building, housing, or sanitation. In New York City, however, there are special examinations which cannot be taken without special study of the law and of the general principles of housing and sanitation. The text-book by Dr. George M. Price, entitled *Tenement-House Inspector*, is a well-devised handbook for persons who contemplate such an examination, but it is not widely known or imitated through the country. Other American cities have no satisfactory equivalent for this course of training of inspectors but are seriously in need of some device for special training.

Captain Allen in New Jersey used to train his inspectors by holding a weekly conference of inspectors, having each raise problems which he had met in the field during the week and discussing those problems in a meeting of the entire group. Each thus received the advantage of the general discussion and elaboration of rules and principles, and the members of the staff acted as a unit in the enforcement of provisions of the law. To avoid the "buying up" of inspectors by owners or builders, Captain Allen adopted also the practice of rotating

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his inspectors so that any given building in process of construction was viewed by many members of his staff—an expedient which might advisedly be copied by administrators of housing acts throughout the country.

The salaries of housing inspectors range from $1,500 a year in New Orleans to $3,000 or more in some of the northern cities. In general, however, they are in the vicinity of $2,000, which is hardly enough to secure the services of competent and trained men. In response to my questionnaire to housing officials through the country a large number stated that their appropriations were inadequate, and that if they had larger appropriations they would use them to secure more inspectors or to raise the salaries of their present inspectors.

Adequate records are essential for the smooth operation of enforcement departments. It should always be possible to find in one place all records appertaining to a given building. This matter has been covered in Mr. Robert E. Todd's pamphlet on *Right Methods in a Housing Bureau*; in the chapter on "Essentials of a Housing Investigation" in Veiller's book, *Housing Reform*; and in Dr. George M. Price's *Tenement-House Inspector*. Detailed questions on five by eight cards of different colors, so that a new building inspection card, violation card, fire-escape card, and so on, can be readily identified and picked out of the files, facilitate smooth operation. As blue prints are bulky and difficult to file, the New Jersey State Board of Tenement House Supervision photographs the ground-floor plan of a new building on a five by eight card and files that photograph with the other records. Violations of the law are also photographed so that if the case is taken to court, definite and convincing proof of the violation will be at hand. This facilitates quick action by the courts and decision in favor of the enforcing department.

Building departments usually have boards of appeal. Veiller contends that they are unnecessary and undesirable in housing departments and tend to nullify the provisions of housing laws by the exceptions which they almost inevitably make. They are unquestionably necessary in cities like Boston where building lots are of every conceivable shape and size, but less neces-

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sary in cities where lots are rectangular and virtually uniform in size. It is perhaps true that the boards are usually made up of builders and architects whose natural leanings will be to make concessions to builders, and that there is insufficient representation of the interests of the sanitarians and general public. On the whole it may be said that the builders are much more likely to make their interests known to the board or the administrative official than the general public is, for the general public usually has no medium through which it can proclaim its needs. New York, Brooklyn, Philadelphia and Cincinnati are practically the only cities in the United States which have housing associations with salaried executives and competent staffs. Such executives are able to watch the enforcement of housing legislation and to serve as representatives of the public interest in good housing.

Another serious difficulty in the enforcement of housing legislation is the division of authority between different departments of the state and city governments. Often the law is obscure, so that it is not quite clear with which authority enforcement of a given section is lodged. Sometimes there is concurrent jurisdiction. In either case, action is difficult. For where department appropriations are inadequate or political influence is strong, neither enforcing official will take the onus and the "buck is passed". This difficulty is perhaps most notably displayed in the provisions concerning the demolition of dangerous buildings. A building gutted by fire can usually be torn down if unsafe, but a building declared unfit for human habitation and vacated by order of the housing or health department is likely to stand for years an eyesore and a menace, used by vagrants or by boys' gangs, and a source of neighborhood contamination. In most cities no department dares to tear it down, and the owner remains indifferent to the "orders" of the department or the clamor of neighbors. Yet public interest demands vigorous and courageous action.

In the proceedings of the sixth annual meeting of the Building Officials Conference this matter was discussed and many building officials complained of their inability to act. Mr. Lindros of Iowa stated that in his state the owner was given thirty days

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to tear a small building down, and if this was not done in the required time the building inspector would engage a wrecking crew and have it torn down, charging the cost of wrecking against the owner of the property. Mr. Harper of Wisconsin outlined a similar practice in his state, but stated that if they were not enjoined against doing so, they engaged a wrecking crew or the fire department to tear the building down and taxed the cost against the property. Mr. Rudolph P. Miller, formerly superintendent of buildings of the Borough of Manhattan, made the following statement for his city:

> For many years I have been familiar with the work of the department and the city has never been called upon in any way to pay damages for anything they did in the way of demolition of buildings. The New York practice is that if an inspector believes the building to be unsafe or dangerous he orders it to be torn down or such work to be done as is necessary to put it in a safe condition. If the owner after twenty-four hours' notice does not signify his intention to immediately do what the superintendent of buildings directs him to do, a survey is called at which the owner and the superintendent of buildings each have representatives, and a third representative is selected as provided in the ordinance from one of the several societies designated by the ordinance, namely, the New York Chapter of Architects, the Brooklyn Chapter of Architects and the New York Society of Architects, not by the superintendent but by those societies. Those three representatives at a time designated, with 12 hours' notice, hold a survey and decide what should be done. Their findings are taken into the court of the county the following day, and that matter has precedence over all other matters in the court at the time, and the court confirms the findings of that survey unless the owner is there to protest. If the owner protests those findings the case is called to trial at once. The owner has a right to call for a jury if he sees fit, if not the case is heard *ex parte*, and is disposed of right then and there. If the findings of the board of inquiry are confirmed by the court without a trial or after trial, a precept is issued to the superintendent to do the work necessary to make that building safe. When that precept has been issued the owner still has an opportunity if he so desires, to do the work himself by immediately paying the costs of the

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survey (which amount to $25.25) and signifying in writing his intention to do the work at once. He can then go ahead and undertake the work himself. If he does not, the superintendent calls the necessary wrecking crew, or he may engage a contractor to reconstruct certain parts of the building. In any case the superintendent must see that the building is made safe. The cost of the work is a first lien against the property. It is very seldom that the superintendent has to do the work. In nearly all cases the owners signify their intention to do it. Of course, before we take these proceedings we must be sure that the building is unsafe and should come down.

The health departments of Louisville, Kentucky, Boston and Cambridge, Massachusetts, and Grand Rapids, Michigan, have followed a somewhat similar practice with reference to the destruction of condemned and unsanitary dwellings. Arrangement for demolition is sometimes made with a contractor who removes the building for the materials which he can salvage out of it. Liens against the property for the cost of demolition are mentioned by several cities. A few others mention collection of costs through taxes. In general, however, it must be stated that enforcement of this section of the law is peculiarly weak or wholly lacking, and that special attention to this problem and the drawing-up of an adequate method of procedure is indicated as necessary. For as our cities grow older, the number of buildings which have outlived their usefulness and are not worth remodeling will increase. The problem will become very serious in our eastern cities during the coming generation.

The one remaining weakness in enforcement of housing legislation lies largely outside of the enforcing department: namely, in the lack of cooperation of the courts. City solicitors or attorneys may have no interest in housing or may fail to appreciate its importance, and for these reasons or because of political pressure or the pressure of owners, they may postpone court action for a dangerously long time. Judges may similarly lack interest in or sympathy with the purpose of the law. Yet if the enforcing department fails to win any case, its prestige is seriously affected and violations will be encouraged, and it will

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be timid about taking cases to court in the future. Unquestionably, the enforcing department is at fault in bringing up a case which has flaws. Mr. Rudolph P. Miller, in the proceedings of the eighth annual meeting of the Building Officials Conference reports that they overcame this difficulty in the building department of Manhattan by using one of their clerks who had had legal training to go over their violation cases which had been submitted previously to the Corporation Counsel without special supervision to eliminate those cases which were trivial. The more serious cases were gone over and the argument was prepared before they were submitted to the Corporation Counsel. They were then followed up to see that they were prosecuted in the order in which they were filed. This practice reduced the number of cases sent to the Corporation Counsel by four per cent. The law was amended to make violation of the building code a misdemeanor. The court was, at the same time, reorganized to provide a Municipal Term in which all city cases were brought. "The judges sitting in the Municipal Term, through the fact that they were handling city cases, altogether, became familiar with the law and better realized its importance. This brought about better cooperation and a great many more convictions, and as a result of that, fewer violations".

The final essential which should be clear from the preceding discussion is public support for the housing enforcement official and his assistants. It is all up-hill work for a building official or housing official if he is continuously under pressure from builders or owners, and has no support from the community in his attempt to carry out the letter and the spirit of the law. Best enforcement of housing legislation will be secured unquestionably where the enforcing department can feel behind it the pressure of public opinion; but to organize a representative public opinion each city needs a housing association which will have in its membership representatives of each of the local civic agencies which have an interest in problems of housing and home life. Such agencies would include the Chamber of Commerce, civic improvement associations, Parent-Teacher Associations, men's and women's clubs, the local Better Homes

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in America Committee, the Family Welfare Society, the Visiting Nursing Association, the Council of Social Agencies, the settlements, Building and Loan Associations and perhaps other organizations. A permanent housing association with a salaried executive and staff is the best solution, though not possible in the smaller cities. But a citizens' committee which can make the enforcing official feel their interest and which can call to his attention the progress of housing-law enforcement in other cities and which can always be properly represented at hearings on any matters involving housing will help him to overcome the downward pressure exerted on his efforts by selfish interests, and will make it possible to raise standards of housing and home life until decent, safe, and sanitary housing shall be within the reach of all American citizens.

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FEDERALISM AND FOREIGN RELATIONS IN CHINA

THE development of normal relations between China and other states is greatly hampered by the confusion produced in western minds through their efforts to distinguish between the names and purposes of a variable list of Chinese generals. The existence of abnormal conditions within China is obvious, but the extent of abnormality has been so exaggerated as to produce in most minds the belief that China is in a condition of political chaos, a transitional ooze between a destroyed medievalism and a new-blown democracy. With elements so fluctuating it appears impossible for other governments to deal. This attitude is comprehensible, but it underestimates the vitality of ancient institutions.

China put away her monarchy in 1911; there can be no serious doubt of the disturbing effect of this action, whatever one may think about its causes, justification or ultimate advantage. Previously she had attempted to abolish the ancient bureaucracy; but this effort, though successful in form, had failed in effect. The family system, which is not only the basis of society but of local government, is practically intact. The country gentry and the merchant gilds continue in their accustomed, though lessened, influence over the conduct of administration. The Nationalist ferment has worked against the quiescent despair that has previously kept the "stupid people" from revolt, but the results of the popular awakening should be to hasten the downfall of militarism. As for tendencies to a break-up, they are not significant in the presence of a force that is new to China in its political aspect, though a cultural nationalism of great age and strength has existed and now serves to enrich the present sentiment for self-determination.

Why, then, is the problem of Sino-foreign relations so unmanageable? Simply because the monarchy, that one among all the ancient institutions of China that failed to survive the Revolution, has never been satisfactorily replaced. Presidents

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and parliaments have fought each other, and neither has won the people's confidence. The nexus between Peking and the provinces—the imperial power of appointment and removal—has been in abeyance. The provinces and localities have ceased to take orders from the capital. The country is not divided, but the power of the central government is dispersed. Provincial autonomy is not new in China, but the subordination of the central to provincial authorities has been unknown for nearly 2000 years save in inter-dynastic upheavals. Thus it is that the revision of China's treaties is being compelled to wait upon the reorganization of her government.

The conduct of foreign relations in the United States does not, perhaps, encourage one to anticipate that the establishment of federal government in China, if it be accomplished, will render perfectly smooth either the international roads and by-paths she must travel or the avenue of national unification. Remembering some of our own embarrassments in the effort to make *e pluribus unum* an operative principle, it is easy to foresee some of the difficulties that China will experience in trying to square her treaties with the legislation of twenty-two and more sovereign provinces or even a smaller number of regional units. Important as unity is, however, in the attitude and actions of one country toward others, the factor of foreign relations is but one of the major elements to be considered in determining a country's constitutional structure. It may hardly be allowed to overshadow such other factors as historical usage, area, population, economic or social conditions, or actual circumstances of the division of political authority. These factors argue strongly for an ultimate United States of China.

In supporting the suggestion that Chinese history and present conditions call for the establishment of a federal system, one must guard against any intimation that full-fledged federalism appears likely to develop within a prognosticable period. However, there is much evidence in favor of its final establishment. The governance of imperial China was only nominally in the hands of the emperor and his councils. Mayers wrote in 1877: "The central government of China, so far as a system of this

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nature is recognized in the existing institutions, is arranged with the object rather of registering and checking the action of the various provincial administrations, than with that of assuming a direct initiative in the conduct of affairs . . . . The central government may be said to criticize rather than to control the action of the twenty-one provincial administrations, wielding, however, at all times the power of immediate removal from his post of any official whose conduct may be found irregular or considered dangerous to the stability of the State." [1]

It is not to be supposed that the imperial officials, left so largely to their own devices of government, were, like the *tuchuns* of today, uncontrolled despots. Tang Shao-yi, who held high offices for a generation under the Manchus and was the first premier under the Republic, has put tersely the relation that existed between officials and people: "In the East, when we think of government, we think of the family, of the district, the smallest unit, in which all citizens are acquainted, [and] are probably related to each other. . . . Nothing will work nationally in China which will not work locally. Government from Peking has never worked locally, the viceroys and other officials sent out always have been forced, even in Manchu days, to bow their heads to local custom and the local will. . . . This is true down to the lowest official and is as true under the Republic as it was under the Monarchy. The villages rule China; not the capital." [2]

Imperial China presented, therefore, a mingling of a theoretically despotic monarch and actually autonomous localities, with a determining voice even in provincial affairs exercised by the heads of influential families, the gentry, resembling, in respect of the influence of its aristocracy, eighteenth-century England. Such a situation is essentially that of federalism though lacking the machinery of elections and the institutions of representative government familiar in the United States.

It is only recently that the significance of this fact has begun to be realized. Both Chinese and foreigners, fearful of a

[1] Mayers, W. F., *The Chinese Government* (Shanghai, 1877), p. 12.

[2] Interview reported in *Japan Advertiser* (Tokyo), Aug. 7, 1923.

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break-up of so brittle an entity as China, have opposed its recognition and effectuation under the Republic in a formal constitution. The military governors in the provinces have continuously declared their desire for unification—as though the Republican revolution had created an unique condition of separatism. Meanwhile each of these *tuchuns* has acted so completely at home about managing, or mis-managing, provincial affairs as to demonstrate that he was accustomed to the conditions of federalism. Only when he has seen an opportunity to unify China or a small part of China under himself has the *tuchun* departed from his natural inclination to regard his province as an established autonomous entity. Nevertheless, and in spite of assertions of independence, the *tuchuns* as a whole have continued to think of China as a unit and themselves a part of it.

Conscious federalism is found in the early days of the Republic in the support given by the *Kuomintang*, the Nationalist Party, to a project to provide for a division of powers in the first draft of the so-called "Permanent Constitution". Apparently its leaders did not see and had no reason to see any disharmony between this project and their declared party principle of a "unified state". It was logical to find this expression coming from the *Kuomintang*, whose leaders were acquainted with the American political system. The move was unsuccessful, and the eclipse suffered by the party between 1913 and 1916 and again between 1917 and 1922 was also an eclipse for the principle of federalism. But it was discussed more and more widely and took on a more practical aspect in the minds of both military and civilian politicians. It was embodied in the independent action of Chekiang, Hunan and several other provinces in drafting constitutions for themselves. Finally, it found its way into the new national constitution of 1923, and it is even more definitely an element of the latest draft constitution, that of 1925.

It would not be advisable to analyze here the powers allocated to the central and provincial governments respectively, even if any of these constitutions might be regarded as working instruments. It is sufficient for the present purpose to

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have observed that the historical and contemporary justification of a federal system has been recognized. The question now to be considered is the prospect for it.

Conditions in contemporary China have been compared frequently with those of medieval Europe. The *tuchun* resembles in essential respects the feudal lord. The latter developed out of the breakdown of empire as did the former. He also rested on military power and regional alliances for his authority. He planted, as have the *tuchuns*, weakling central governments. He lasted until the central governments grew strong with the rise of a middle class to which peace and order were essential. Will the overthrow of the Chinese *tuchuns* be accomplished in the same way?

China has the strong merchant class and the powerful gentry whose interests are also in regularity and peace. But she has put away her monarch and seems disinclined to restore him. She lacks, therefore, a central figure around which the forces of economic reconstruction might rally. So far none of the *tuchuns* who has bid for leadership has obtained general support. All have been faction heads, as they must have been to achieve any success at all.

In the spring of 1923 the writer had a talk at Mukden with the "Young General", Chang Hsueh-liang, son of "Generalissimo" Chang Tso-lin. He suggested a conciliar executive for the Chinese central government, composed of from five to nine of the principal political leaders throughout the country. This idea has been discussed widely. In the same year Tang Shao-yi proposed that China should forget the president, parliament, constitution and other mistakes of the republic and form a national council of twenty-two men chosen one from each province with a chairman chosen by lot. Mr. Tang was inconsistent in suggesting the election of those "elder statesmen" by provincial assemblies, which are quite as anomalous and uninfluential in the provinces as is the parliament at the capital. It would be necessary, as he said, to base the government upon actual conditions, and that would involve creating a council composed of or controlled by the real forces in the country at large.

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What are those forces? What are their geographical habitats? Are they likely to be permanent? Is it possible for them to work together?

The Nationalist campaign, as it progressed from Canton northward, created a type of central and provincial government resembling the American commission system for cities, displacing both the *tuchuns* and the assemblies. Should all China come within the Nationalist orbit, it is probable that the party would recognize the necessity of federalism and that the problem of *tuchunal* wars would cease. Large-scale disbandment of armies could be anticipated, together with the unification of surviving troops under the central authority. In such a set of circumstances the larger problems—the determination of the proper division of powers and the negotiation of new treaties—would be solved.

While it may be reasonable to hope for this development it is not justifiable to put other possibilities out of mind. At this moment (August, 1927) the division within the *Kuomintang* has brought south China once more under military control. If the Nationalists fail to reunite, this unfortunate situation will be prolonged indefinitely. If the northern *tuchuns* are able to hold Chihli and Manchuria, they will require places in any combination that may be formed. Yunnan and Szechuan are *tuchunal* bailiwicks, as is Shansi. In the presence of these harsh facts it may fairly be assumed that if federalism will not work, there is no field for the unitary principle. Strong men have tried in vain to subdue the country. It is unlikely that another will succeed where Yuan Shih-k'ai failed.

It may be, it is likely to be, true that federalism for China will take the form of regionalism. That has been the recent tendency of federalism in the United States, and it would be advantageous to have it take that path in China from the beginning. If it does, unnatural political and economic lines will be broken down, leaving the people of large areas with similar interests and a logical centre of activities free to work out common problems. Chinese provinces have been for centuries inclined to group themselves into regions, a tendency which better communications will accentuate. From the political

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angle the recognition of regions as units rather than provinces would reduce somewhat the number of authorities to be considered for representation in the central government. It would also reduce the cost of government.

This consideration leads naturally to another: that for the present all that can be envisaged is a number of regions of varying size and types of political control which are conscious of each other's existence but which are related to each other in no way beyond the common membership in the Chinese state, itself defined in a constitution at present inoperative. One region recognizes another only for the sake of an alliance or when seeking to absorb it by conquest. Such a situation is not federalism; it might be termed unconscious confederation. The next stage, it may be anticipated, will be true confederation, to be followed subsequently by the pooling of common interests in a federal state.

The relation of what has gone before to the problem at present most prominent in China's foreign relations may now be dealt with. Until the beginning of 1927, the powers were demanding that China should have a "strong central government" before negotiation for treaty revision might be undertaken. By this it was meant that the central government should control the entire country—that it should be not only strong but pervasive. While, naturally, the powers did not verbally specify what sort of government China should have, they appeared to assume that unless it were unitary, thus following the form though not the substance of imperial organization, treaty revision would be dangerous and negotiation fruitless.

It cannot be denied that there was justification for this attitude, in view of the influence exerted for orderly living by the splendid but effete monarchy and of the chaos that had prevailed since the death of Yuan Shih-k'ai, almost an emperor. Added to these deterrents was the attitude of the Chinese government which saw in any tendency of foreign states to deal with factions a scheme to break up the Republic and swallow the pieces. But the time came when the powers decided that to insist on a strong, central government was tantamount to

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supporting one faction against others. This could be justified only so long as that faction was noticeably more powerful and its jurisdiction more extensive than others. As the governments at Peking have been of doubtful constitutionality since 1916 they have had only slightly better title to recognition than any other faction that could demonstrate the possession of actual authority. With the remarkable spread of Nationalist jurisdiction the powers were faced with the necessity of arranging ways and means of conducting relations with a large area of China entirely detached, politically, from the recognized government. Their hands were forced and in consequence the demand for a "strong central government" was dropped.

In the "British Proposals to the Powers concerning China," made public December 18, 1926, occurs this suggestion: "the [proposed joint] declaration should show that it is the policy of the Powers to endeavor to maintain harmonious relations with China, without waiting for or insisting on the prior establishment of a strong Central Government". The American Secretary of State on January 26, 1927, stated that: "The United States is now and has been, ever since the negotiation of the Washington Treaty, prepared to enter into negotiations with any Government of China or delegates who can represent or speak for China . . . if China can agree upon the appointment of delegates representing the authorities or the people of the country we are prepared to negotiate . . ." Japan actually entered upon negotiations with Peking in January of this year for the revision of its general treaty with China after stating to the Chinese foreign minister that: "The Japanese Government are ready to enter into negotiations with the Chinese Government for a revision of the tariffs and commercial articles of the treaty. . . . The Japanese Government, however, have no intention of limiting the scope of the negotiations to the questions defined in Article 26 of the treaty. Without prejudice to their legal position in the matter, they are willing to consider sympathetically the wishes of the Chinese Government for a more extensive revision".[1]

[1] The present Japanese Government, which succeeded that of Premier Waka-

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In view of the foregoing paragraphs is there any practicable line of action upon which the statements of the British and the American governments may be implemented? Our response is that there is no early prospect of negotiations with a Chinese joint delegation and that if the American plan of negotiation must be read as requiring that mode of action, both the British plan of separate negotiation with the major factions and the Japanese plan of negotiation with Peking are more applicable to existing conditions than the American plan. As between the British and the Japanese plans, the latter has the advantages of observing the proprieties of international law, of avoiding the necessity of renewed negotiations whenever one regional faction succeeds another and of permitting contemporary, unheralded conversations with the factions outside the control of Peking. But both plans have the virtue of suggesting action, and the situation calls for a program. The Chinese have lost confidence in generous platitudes.

Two criticisms have been directed against either the British or the Japanese plan: (1) that both tend toward the break-up of China inevitably if not consciously; (2) that they will accomplish little because what is agreed to by one Chinese group will be repudiated by others. Both criticisms have weight; for both illustrations are available. But neither is sufficiently important to justify rejection of the plans. If the analysis heretofore presented of historical and contemporary conditions in China is at all accurate, there is slight danger of the break-up of the country. And since treaty revision, to be satisfactory to any faction, must involve the early restoration to China of complete independence in the decision of her own policies, it is not likely to find serious objection from any quarter of the country. The first consideration is to win the confidence of the Chinese. That accomplished, there need be little difficulty in the mere machinery of negotiation.

Finally, there is justification for confidence that China is to

tanki in April, 1927, announced in July that "there is no alternative for Japan but to deal with local governments . . . . as the occasion demands, pending the final reunification of the country."

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remain China. The probable evolution of her polity appears to be a gradual federalization. Thus foreign states may anticipate the increase of central authority and of ease in the conduct of relations with it. The process is certain to be slow and it affords no materials for present policy beyond a counsel of confidence for the future. Meanwhile there is ground for reliance, in negotiations for treaty revision, upon the stability of agencies underlying the much-advertised *tuchuns* and particularly upon the long-established tradition of provincial autonomy.

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INTERNATIONAL LEGISLATION

GILBERT N. LEWIS, in his *Anatomy of Science*,[1] remarks that it is a common fault of mankind to refuse to recognize the existence of a new phenomenon unless some mechanism has been devised or some explanation offered that relates it to concepts with which we are already familiar. He is speaking of phenomena within the sphere of the physical sciences, but his observation applies with equal force to the whole field of human knowledge. Every student of the social sciences is familar with the tendency of the human mind to refuse recognition to a new social phenomenon which does not readily accord with the underlying postulates of the established system of thought. Perhaps it is the difficulty of arriving at general propositions of permanent utility in a field of knowledge as full of variable elements as is human society that makes us cling to those propositions when arrived at with such a loyal and enduring affection. At any rate, it must be admitted that both the political scientist and the jurist tend to endow the established postulates of their sciences with a rigidity and a longevity that does not accord with the changing character of human institutions.

This tendency is particularly apparent in such an abstract branch of the juristic science as that of international jurisprudence, where the vastness of the field of action and the novelty of the subject matter make the construction of a scientific system so enormously difficult a task. Most of the doctrines we possess in this field have come down to us from the infancy of the science, and their tenacity in the face of the rapidly changing character of the international community in the last century has brought about an extraordinary divergence between accepted theory and current practice.

A striking example of the reluctance to recognize phenomena which are apparently inconsistent with these inherited doctrines

[1] P. 171.

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is found in the scant attention paid by the expositors of international law to that branch of the subject which may be described as the statute law of nations. In spite of the fact that this phenomenon has enjoyed a vigorous and lusty growth for more than half a century and is rapidly becoming the main source of new law in the international sphere, it is not yet admitted into the accepted classification and terminology of the subject, and the average layman is quite unconscious of its existence.

"Of all the achievements of the past hundred years," said John Bassett Moore in 1907, "the thing that is most remarkable, in the domain of international relations, has been the modification and improvement of international law by what may be called acts of international legislation."[1] He referred, of course, to the extensive and growing use of general treaties and multilateral conventions for the purpose of establishing general regulations in matters of common interest to the members of the family of nations. The term "legislation" as applied to these conventions, although having no place in the accepted classification of the science of international jurisprudence, was not a new one, having been used in a qualified manner by Holland as early as 1876. Since Judge Moore made the above observation, the number of these conventions has increased at a very rapid rate, and other authorities have become conscious of the fact that a development of major importance was going on almost without notice in the international jural structure.

Thus Professor Garner, in surveying the recent developments in international law, refers to these multilateral conventions as "the most significant development in international law during the past century", and states that they constitute in ther totality "a remarkable output of international legislation, the quantity and range of which few persons realize."[2] In an article in the British Year Book of International Law for 1924, Professor P. J. Baker of the University of London recounts at length the

[1] *Proceedings, American Society of International Law, 1907*, p. 252.

[2] J. W. Garner, *Recent Developments in International Law* (Calcutta, 1925), p. 604.

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various manifestations of legislative activity that have appeared in the international community and concludes that in the development of the legislative process lies the most hopeful means for the early improvement of the general system of international law.[1] And in an illuminating article in a recent number of this QUARTERLY, Professor Pitman B. Potter points out the very interesting process which has grown up in international practice, whereby subjects originally of purely domestic concern are constantly passing into the field of international jurisdiction through the aid of general international agreements. He describes this process as follows:[2]

> First comes national discretion in the absence of restrictions on the primitive plenary national power. We pass secondly to the state of facts where international interest arises. Diplomatic activity ensues, leaving national legal discretion intact but inducing a give and take in the exercise of that discretion. The result is an expanding flood of voluntary bilateral international agreements until unilateral regulation ceases to be permissible. The third stage is marked by the general international exchange of information and general international agreements in terms of abstract law and principle. Finally, come international administrative bureaus to execute and—if the process be pressed to its logical conclusion—to enforce such law. It is the generic process of substituting international government for the anarchy of unrestrained national liberty.

Of the great importance of the development of a process of deliberate law-making in the international community, in relation both to its power to expand the *corpus* of the law and to its effect upon the underlying postulates of the jural system, there cannot be any doubt. Yet this revealing phenomenon is all but ignored in the standard treatises on international law,[3] and receives but scant attention in the teaching of the subject in our

[1] P. 64.

[2] *Political Science Quarterly* (December, 1926), p. 566.

[3] So recent and comprehensive a treatise as Charles Cheney Hyde's *International Law* (Boston, 1922), does not appear to contain any discussion of the subject at all.

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universities. If the term "legislation" appears at all in connection with general treaties, it is usually accompanied by a statement that its use is not technically correct because the process so described differs in important respects from legislation as we know it in the local state.[1] Even among those authors who recognize without reserve the law-making function of general treaties, there is little agreement as to which treaties may be properly so called, and practically no attempt has been made at critical analysis of the process to determine its proper place in the international jural structure.

Not only is the phenomenon often passed over in silence, but the basic principles of the science of international law as inherited by the present generation would seem to leave no room for the possibility of any such development. How is it possible to have legislation in a community of separate sovereign states recognizing no superior power and without any central administrative machinery or legislative organ? The society of nations as it is now constituted has none of the political make-up which we are accustomed to associate with the concept of legislation. It is in reality but a loosely organized group of equal and independent units with no written constitution and no delegated authority. One would think that the essentially individualistic principles of sovereignty and equality which form the basic structure of the present science of international law would entirely preclude the possibility of any deliberate enactments of law binding generally upon the units of the community. The rules by which nations are governed are commonly said to be unexpressed rules resting on the consent of all nations as revealed by custom. The power to legislate, furthermore, is usually associated in our minds with the power to command, and, theoretically, the power to command has no place in the making of international law. If we adhere literally to the seventeenth-century postulates which still serve as the foundation for the science of international law, and if we cling to the common conception of legislation as derived from our

[1] See, for example, Charles G. Fenwick, *International Law* (New York, 1924), p. 318.

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experience with it in the local state, it would be very difficult indeed to see how deliberate law-making could be accomplished in the international community.

On the other hand, if we put out of mind for a moment these inherited postulates and consider only the present realities of international life, it would be equally difficult to see how the existing relations between states could have grown to their present complex structure without the assistance of some kind of legislative process. It is a readily observable fact that human society does not progress beyond the most primitive stages without the aid of some workable process of expressly enacting new rules of conduct to keep pace with its enlarging activities. Man is, we are told, a community-building animal, and as he advances in his control over the physical world, his community life increases in scope and complexity. At the same time, it is equally true that he is a competitive creature, and his enlarging community activities are possible only when they are regulated and adjusted by an appropriate system of laws. Every new social activity calls very soon for the creation of new law if it is to be carried on without incessant friction.

Now new law can only come into existence in two ways—either tacitly, by slow crystallization of general custom into binding rules of conduct, or expressly, by the positive enactment of rules of conduct by whatever part of the community has the actual power to do so. The first we know as customary law, and the second as legislation or statutory law. In any progressive community, the need for common regulation of new activities soon becomes much greater than the slow method of custom can supply. Customary law must always follow a long way in the rear and can never anticipate the needs and interests of society. This fact inevitably results in the conscious or unconscious development of some kind of legislative process in every community. Such process need not follow any prescribed form, but will take shape from the nature of the community which it serves. We are accustomed in the modern state to the exercise of legislative power by a central body called a legislature or parliament acting on the principle of numerical representation, and we tend to forget that this type of legislation has

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only existed for a few hundred years and that the positive enactment of new law has, in fact, been achieved in many ways.

In such a rapidly growing community as the society of nations, it would be inconceivable that we should long remain without some kind of legislative process to bring the law within hailing distance, at least, of the needs of international intercourse. The existence of the postulates of sovereignty and equality might make the development of such a process difficult, but they would not permanently stand in the way of the expanding social interests of the ultimate members of the community. International intercourse does not exist *because* of these postulates, but because men *want* to trade with each other and to travel and reap the fruits of a wider civilization than is possible within the limits of artificial national boundaries.

It must be apparent to anyone familiar with the actual conduct of international relations that nations do not, in fact, limit their daily intercourse by strict adherence to the doctrines of sovereignty and equality. These are often convenient doctrines to bring to the defense of interests which a nation conceives to be vital, and for this reason few governments are disposed to agree to their modification in the abstract. However, they are apt to be more real to the scholar looking for firm ground on which to construct his system of international jurisprudence than to the harassed foreign office official trying as best he can to smooth out the inevitable difficulties which arise in the daily intercourse across national boundaries. Professor Brierly has accurately observed that "states in their normal relations neither claim for themselves, nor recognize in others, that wide freedom to act without taking account of the interests of other states which the theory of the law concedes to them." And he adds that "the fundamental fact which seems to lie at the root of the divorce between law and policy in international relations is that the law remains formally based on an individualistic theory of the relations of states which the states themselves have to a very great extent discarded. Law is still thinking in terms of rights; states are thinking of interests and demanding that they be protected."[1] A brief examination of the history

[1] *British Year Book of International Law, 1924*, p. 16.

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of international relations shows that a legislative process is not only possible in the international community but that it has existed almost since the beginning of that community.

The first instance which we find of deliberate enactment of common regulations by concerted action occurred simultaneously with the birth of the modern state system, following the Thirty Years' War. That conflict had been sufficiently devastating to demonstrate clearly the necessity of agreeing upon a common adjustment of their mutual interests if the states of Europe were to live together in peace. In the treaties of Osnabrück and Münster we have an example of collective action by the body of civilized states in fixing by written instrument the political status of individual states—what was, in effect, the first faint beginning of an international constitutional law. The principal of territorial sovereignty recognized at the Peace of Westphalia, both in political and religious matters, has continued up to the present time to be a fundamental postulate of the international jural system. Professor Fenwick has described this Peace as "a statutory landmark in the public law of Europe".[1]

The century following the Peace of Westphalia shows little progress in the development of customary law and practically none in the realm of positive enactment of general rules for the regulation of international activities. The new states were largely self-contained and their intercourse small. Their rulers were concerned with the perpetuation of their own dynasties and the welfare of their own national communities rather than with the general welfare of Christendom. The conditions were not favorable to the development of the new public law by action in concert.

It required such an extensive upheaval as the Napoleonic Wars to bring about the next important instance of collective action by the states of Europe for the purpose of regulating their mutual interests by general treaty. The extent of the damage wrought by Napoleon in the structure of the international community made the act of reconstruction a matter of general con-

[1] Fenwick, *op. cit.*, p. 20.

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cern to all the nations of Europe. The Congress of Vienna, which met in 1814 to effect this reconstruction, took on to some extent the character of a legislative assembly, and the Final Act of that Congress was of great importance in the development of the public law of Europe. Not only did it provide for fundamental changes in the political structure of the family of nations, but it also, for the first time in history, by stipulating for the freedom of navigation on certain international rivers, enacted a general principle of conduct in a non-political activity aimed at the benefit of the whole group rather than the particular advantage of individual nations. The subject-matter of that provision was ideally suited to regulation by common agreement for the benefit of all. Had it been necessary to wait for the growth of customary law to mitigate the evils growing out of the arbitrary and conflicting acts of the individual nations bordering on these rivers, the water-borne commerce of Europe would have been retarded in its development for many years. The wording of the provision is as follows: [1]

> Article 109. The navigation of the rivers, along their whole course, referred to in the preceding Article, from the point where each of them becomes navigable, to its mouth, shall be entirely free, and shall not, in respect to commerce, be prohibited to any one; it being understood that the regulations established with regard to the police of this navigation shall be respected, as they will be framed alike for all, and as favorable as possible to the commerce of all nations.

It will be noted that this provision is not in the form of a pious wish, or a request, or a mere bargain or contract in which the benefits are confined to the signatory powers. It is a positive regulation regarding the future use of navigable rivers for the benefit of all, and in form it differs little from municipal legislation regulating the use of similar public resources.

Other provisions of the Final Act of the Congress of Vienna which are of interest in connection with the growth of written international law are those concerning the classification of dip-

[1] *British State Papers*, vol. II (1814-15), p. 52 (French text).

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lomatic envoys and the perpetual neutralization of Switzerland. Determined efforts were made by Great Britain to have included a provision abolishing the slave trade, but the practical difficulties in the way resulted in merely a declaration of the desirability of the abolition of the traffic. This subject, which is well suited to regulation by common agreement, was subsequently dealt with in later general treaties with a greater measure of success.

Up to the time of the Congress of Vienna, international conferences for the purpose of regulating affairs of common concern had occurred only at the termination of wars, and their primary object had been the establishment of peace. The decade following the Congress of Vienna saw the inauguration of the practice of holding periodic conferences in time of peace for the consideration of matters of general interest to the governments of Europe. At first these conferences were occupied chiefly with political rather than legal matters, and the resulting general treaties are of interest more as indications of the growing habit of concerted action among the civilized nations of the world than as contributions to the existing body of international law. Although the reactionary policies that dominated the conferences growing out of the Holy Alliance prevented the taking of constructive steps to improve the existing jural structure, nevertheless the advantages of the congress method itself became immediately apparent to the participants, as is shown by the following extract from a letter written by Lord Castlereagh from Aix-la-Chapelle in October, 1818:[1]

> It is satisfactory to observe how little embarrassment and how much solid good grow out of these reunions, which sound so terrible at a distance. It really appears to me to be a new discovery in the European government, at once extinguishing the cobwebs with which diplomacy obscures the horizon, bringing the whole bearing of the system into its true light, and giving to the counsels of the Great Powers the efficiency and almost the simplicity of a single State.

Of the attempts at concerted action in the permanent regula-

[1] *The Correspondence . . . of Viscount Castlereagh,* 3d series, vol. XII, p. 54.

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tion of matters of general interest during this period, only a few are worth noting. Through the intervention of the Great Powers in the struggle between Turkey and the Greeks in 1827, the independence of Greece was established and its boundaries defined. Belgium was made a permanent neutral state by the Treaties of London of 1831 and 1839, and the latter treaty provided that the articles of the Final Act of the Congress of Vienna relative to the free navigation of navigable rivers should be applied to those rivers which separated the Belgian and Dutch territories. Great Britain continued her efforts to abolish the slave trade, and in 1841 secured a general treaty with the five leading powers on the subject, but it was not until 1890 that a definite agreement was obtained looking toward concerted action in the suppression of the traffic.

The next important attempt at the express enactment of principles of substantive law came in 1856, when the Powers which had assembled in Paris for the purpose of making a general settlement following the Crimean War took the opportunity to make a declaration respecting maritime law in time of war. This declaration, which is noted for its brevity and clearness, provided as follows: [1]

> 1. Privateering is, and remains abolished;
>
> 2. The neutral flag covers enemy's goods, with the exception of contraband of war;
>
> 3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag;
>
> 4. Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

This declaration was acceded to by most of the maritime powers of the world, and has had a profound effect upon the development of the law of maritime warfare. The United States was unwilling to accede to it in the absence of a broad stipulation of non-liability of private property to capture at sea, but has subsequently acted in general conformity with the rules laid down therein.

[1] *British State Papers*, vol. XLVI, p. 26 (French text).

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The powers assembled at the Conference of Paris in 1856 also took occasion to extend to the Danube the principles regarding the navigation of international rivers laid down in the Final Act of the Congress of Vienna, and they declared that "its arrangement henceforth forms a part of the Public Law of Europe".[1]

Following the Declaration of Paris there appears a sudden increase in the practice of enacting common regulations by general written agreement. This increase was the direct result of the widespread social and economic changes that occurred in the international community in the nineteenth century. The coming of the industrial age, the invention of new and more expeditious means of communication and transportation, and the search for raw materials, resulted in a multiplication of international relationships at an unprecedented rate. There followed a dawning consciousness among the nations of the civilized world that many spheres of intercourse could only be developed on a basis of common agreement and with some mutual sacrifice of individual freedom of action.

A variety of activities which were formerly largely local in their range had acquired an international character. The development of the postal, telegraph, and railway services raised problems of administration that were of concern to the international community as a whole. Sanitation and public welfare were matters which, with a vastly increased traffic across national borders, could only be successfully dealt with by international action. The effective administration of these activities could not be left to the uncontrolled caprice of individual nations.

In the absence of any legislative machinery, the states concerned in these new activities followed the practice of coming together in conference for the purpose of agreeing upon general rules of conduct and administration. There resulted a series of multilateral treaties and conventions concerned with the international regulation of numerous phases of intercourse between nations. Up to the outbreak of the World War in 1914, more than fifty such conventions had been adopted and

[1] Martens, *Nouveau Recueil général de Traités*, etc., vol. XV, p. 776.

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put into force, and since peace was declared the process has been greatly accelerated. The wide scope of these general agreements is indicated in the list set out in the footnote.[1]

[1] The following multilateral conventions were concluded between 1857 and 1914:

1857 Redemption of toll dues on sounds and belts from the North Sea to the Baltic Sea.
1861 Redemption of state toll on the Elbe.
1863 Redemption of toll dues on the Scheldt.
1864 Geneva or Red Cross Convention.
1865 Latin Monetary Union.
1868 Declaration of St. Petersburg.
1873 Scandinavian Monetary Union.
1874 Universal Postal Convention.
1875 International Telegraph Convention.
1875 Establishment of International Bureau of Weights and Measures.
1875 Unification of Metric System.
1878 Treaty of Berlin.
1881 Convention regarding measures against Phylloxera.
1882 Convention for the police of North Sea Fisheries.
1883 Convention for the protection of industrial property.
1884 Convention for the protection of submarine cables.
1885 General Act of Berlin relating to the Congo Basin, containing stipulations concerning freedom of commerce and the suppression of the slave trade.
1885 Establishment of a standard international concert pitch.
1886 Convention for protection of literary and artistic property.
1886 Convention for international exchange of official documents and scientific and literary publications.
1886 *Technical standardization of railways.*
1886 Sealing of railway trucks subject to customs inspection.
1887 Convention regulating liquor traffic in the North Sea.
1888 Treaty of Constantinople providing for neutralization of Suez Canal and for freedom of navigation thereof.
1889 Establishment of an international union of American Republics for the collection of commercial information.
1890 General Act of the Brussels anti-slavery conference.
1890 Formation of an international union for the publication of customs tariffs.
1890 Convention relating to the transportation of goods by rail.
1892 International sanitary convention.
1898 Convention regarding tonnage measurement of vessels for inland navigation.
1899 Hague Peace Conference which adopted three Conventions and three Declarations relating to pacific settlement of international disputes, conduct of warfare on land, and adaptation of principles of Geneva Convention to maritime warfare.

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They have touched upon nearly every phase of international intercourse, though the greatest activity has taken place in the non-political spheres,—economic, social and humanitarian.

The establishment of the League of Nations in 1919 was the most ambitious attempt yet undertaken by the nations of the

1901 Protocol following "Boxer" insurrection in China, containing stipulations regarding relations between signatory powers and China.
1902 Convention for protection of birds useful to agriculture.
1902 Regulation of guardianship of minors.
1902 Abolition of bounties on production and exploitation of sugar.
1904 Convention relative to suppression of white slave traffic.
1905 Creation of an international institute of agriculture.
1905 Convention relating to civil procedure.
1905 Inter-American sanitary convention.
1906 Convention prohibiting use of white phosphorus in matches.
1906 Unification of pharmacopœial formulæ for potent drugs.
1906 Prohibition of night work for women in industrial employment.
1906 General Act of the Algeciras conference relating to Morocco.
1907 Second Hague Peace Conference, formulating thirteen conventions relating to pacific settlement of international disputes, limiting employment of force in collection of contract debts, laws of war on land and sea, and establishment of an international prize court.
1909 Convention regarding international circulation of automobiles.
1910 Unification of laws respecting salvage at sea.
1910 Unification of laws respecting collisions between vessels.
1910 Agreement for repression of obscene publications.
1910 Inter-American literary and artistic copyright.
1910 Inter-American convention for protection of industrial property.
1911 Convention for protection of fur-bearing seals in North Pacific.
1911 Agreement for prevention of false declaration of origin of goods.
1912 International wireless telegraph convention.
1912 International opium convention.
1913 Convention for unification of commercial statistics.
1919 Peace Treaties following World War, containing many law-making stipulations, such as those relating to mandated territories, nationality, rivers, canals, servitudes, division of debts, effect of war on contracts and treaties, protection of minorities, etc.

The above list does not pretend to be exhaustive. It is made up from a comparison of the lists contained in the following works: Paul S. Reinsch, *Public International Unions* (Boston, 1916); L. S. Woolf, *International Government* (New York, 1916); J. W. Garner, *op. cit.*; List of Commercial Treaties issued by United States Tariff Commission; L. Oppenheim, *International Law,* Raymond L. Buell, *International Relations* (New York, 1925); Raymond L. Bridgman, *First Book of World Law* (Boston, 1911); F. B. Sayre, *Experiments in International Administration* (New York, 1919). No two of the above lists agree.

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world toward the organization of the international community and the regulation of international intercourse by written agreement. The failure to secure as members such important states as the United States and Russia prevented the League from becoming the recognized mouthpiece of the family of nations, but, in spite of this limitation, it has done much to aid in the expansion of the existing body of written law. It has a formal written constitution which not only provides for the creation of permanent political institutions with definite powers, but also lays down general principles of conduct binding upon members in their dealings with each other. In addition, the establishment of permanent machinery for conference and investigation has opened the way for the consideration of many new subjects for general agreement. Already there have been concluded, through this machinery, conventions dealing with such subjects as opium; traffic in women and children; obscene publications; freedom of transit across national boundaries; international regulation of navigable waters, railways and maritime ports; neutralization of the Aaland Islands; arbitration clauses in commercial contracts; simplification of customs formalities; and the development of hydraulic power affecting more than one state. Furthermore, the widespread sentiment for codification of international law led in 1924 to the appointment by the League of Nations of a committee of experts for the purpose of aiding in the development of "international treaty law". While the word "codification" is used in connection with this project, it is apparent from the nature of the subjects taken under study by the committee that a large portion of their efforts will be devoted to the drafting of new rules of law where none exist now, or where the existing rules are obsolete or vague—in other words, to perform the functions of a legislative drafting committee.[1]

[1] The resolution adopted by the Assembly of the League of Nations, authorizing the appointment of this committee, begins with the following statement: "Considering that the experience of five years has demonstrated the valuable services which the League of Nations can render towards rapidly meeting *the legislative needs of international relations*, ..." See *Supplement, American Journal of International Law*, vol. XX, Special no. (July, 1926), p. 2.

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We find from this brief survey of international collective action that there has been enacted by written agreement within the space of a hundred years an extensive body of rules of conduct by which a great variety of international activities are being regulated in the general interest, in much the same manner as communal activities are regulated within the local state. This body of rules has come into existence largely without the aid of consciously designed legislative machinery and without the sanction of formal constitutional authority. To what extent are these rules entitled to be considered as law, as that term is used in the international sphere, and where do they fit into the existing international legal structure?

In modern times, law has come to be viewed, not as an all-embracing system of rules of conduct logically deduced from a fixed group of fundamental rights and eternal principles, but, from its functional aspect, as a practical process of maintaining existing values of civilization and causing the social intercourse of men to run more smoothly and effectively. Applying this view to international law, we may say that it is simply the sum total of those rules of conduct, written or unwritten, which have been adopted in response to the practical needs of international intercourse, and are habitually treated as legally binding by civilized states in their dealings with each other.

Now it can hardly be doubted that the rules of conduct laid down in the general treaties and conventions referred to above are legally binding obligations. They are embodied in formally enacted compacts, and it is the firmly established habit of foreign offices to consider that such compacts have legal force. The language used is often imperative in form, and stipulates courses of action to be followed generally without regard to the exigencies of particular instances. It hardly need be said that these obligations are conscientiously observed by the contracting parties, more so, perhaps, than are customary rules of international law. They operate directly to make available to the nations generally the fruits of modern civilization, and they provide the only feasible means of moulding the legal order to meet the constantly changing needs of the community. We may, therefore, safely say that they contain the essential ele-

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ments of rules of international law and that they form an integral part of the body of that law. And since they are express enactment of rules of conduct, as contrasted with rules tacitly enacted by custom, it would seem that we may not improperly describe them as legislation, and their content as the statute law of nations.

Objection has been made to the use of the term "legislation" in this connection on the ground that these multilateral conventions are mere contracts between equal powers, and lack the element of command addressed by a superior legislative will to persons subject to its control, which is deemed to be an essential characteristic of true legislation. However, this would seem to be giving to the term too narrow a meaning altogether. The element of command present in legislation as we know it in the local state is not inherent in the act of law-making itself, but arises out of the particular nature of municipal law and the form of the community in which it appears. The analytical jurist defines the local state as a political organization "having the authority to issue commands which are legally binding upon individuals",[1] and necessarily deduces from this that law-making in such a community must take the form of commands from a superior to an inferior. When we enter the realms of international relations, however, we do not find anything to correspond to these superior wills and inferior wills of the local state, but a "collection of equal wills",[2] and the interplay of independent powers. In such a community, law must of necessity be assumed to rest upon the voluntary agreement, whether expressed or implied, of the individual units of the community, since it cannot, in theory, be imposed from above. Among independent entities the only way in which law can be deliberately enacted is by multilateral contract.

Another objection to the recognition of these conventions as legislation arises out of the fact that they are not as a rule subscribed to by all the members of the family of nations. This

[1] W. W. Willoughby, *Fundamental Concepts of Public Law* (New York, 1924), p. 31.

[2] *Ibid.*, p. 282.

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objection is based on the assumed postulate that a rule of international law must be of universal application to be considered as true law, which in turn is a deduction from the doctrine that all states are independent and that no state or group of states can impose a rule of conduct on another state against its will. However, there is some confusion of thought here, which can be traced to our habit of considering laws from the territorial viewpoint, rather than from the viewpoint of the interests which they are designed to promote. To say that no nation can be bound by a rule of conduct against its will is a very different thing from saying that no rule of conduct can have legal force unless every nation within the territory comprised in the family of nations agrees to it. That would be a very impractical test to apply to rules of international law, since it takes no account of the facts of international life.

In reality, the interests and activities of the nations of the world, which it is the function of international law to regulate, are practically never co-extensive with the territory of the world community. They are more often regional and dependent upon various physical factors quite unrelated to political considerations. The society of nations is not, in fact, a homogeneous society. Its numbers, although theoretically equal in law, are strikingly dissimilar in fact. They differ widely in size, in state of civilization, and in the nature and scope of their external relations. Some are maritime states and some are not. Some are traversed by international waterways, while others have no concern in the regulation of such avenues of communication. The contiguity of a number of states on the European continent creates problems of international regulation for those states in matters of transit and communication which are of no interest to states on other continents. There are many authorities who hold that there is a distinct "American International Law" applicable to the American Republics, in addition to the general principles of the law of nations. It is obvious that many established rules of customary law are not of universal nor even of general interest, and that comparatively few of them can show a foundation of universal usage.

In our local constitutional form of government, we are ac-

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customed to the making of laws by a system of representation based on numbers within fixed territorial limits, whereas in the international community, the vastness of the territory covered, in contrast with the extent of the interests involved, makes the adoption of such a system impractical at the present stage of development. Instead, there has grown up a system of law-making on the basis of interest rather than numbers. Laws come into existence through the common accord of those nations which happen to be concerned with a particular subject of international activity. And for the enactment of those laws, there has developed in the international community, not a single central legislature with power to act for the whole community, but a number of separate temporary legislative bodies, created for particular purposes and participated in by the nations concerned in those purposes.

It is true that the rules enacted by these bodies cannot bind nations not parties thereto, but when all, or practically all, of the nations having an interest in a particular subject matter concur in formulating written rules of conduct in regard to it, or in altering, defining, or abolishing existing rules, it is of little practical importance whether the nations so acting include all of the members of the family of nations or not. The necessity for universality of adhesion to a law-making treaty, if it exists at all, arises out of the subject matter of the treaty and not out of the function of law-making itself.

It need hardly be pointed out that the great need in world affairs today is the expansion and modification of the existing body of international law to correspond with the rapidly changing character of the international community, and to reduce those wide areas of relationships now subject to no control but that of comity or caprice. Present efforts to provide adequate judicial and arbitral facilities in the community will help to some extent, but real progress can only be achieved through recourse to the legislative process. It is, therefore, of the greatest importance that serious attention be given to the forms in which this process has appeared in the community in the past, its proper place in the international legal system, and the ways in which it may be made more effective in the future.

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MACHIAVELLI AND TUDOR ENGLAND

THE proposition that Machiavelli exercised a marked influence during the Renaissance has seemed so logical as to gain among historians the currency of a truism. The references to Machiavelli's moulding influence on sixteenth century writers and statesmen are copious and ubiquitous, though generally unsupported—the historians seeming to agree tacitly that for such a reasonable postulate more evidence than already existed would be superfluous. To judge from Elizabethan literature the historian's assumption is justified, for few names appeared as frequently as Machiavelli's. If, however, we examine the garb in which it appeared and the connotations it assumed, we shall be able to form a swift decision as to the value this plenitude of allusion holds for the student of political science.

Through the efforts of Gabriel Harvey, Machiavelli's works were first introduced to English writers at the University of Cambridge in 1573.[1] Four years later appeared an English translation of Gentillet's recently published *Contre-Machiavel*,[2] representing the curiously perverted view of a French Huguenot.[3] Inasmuch as neither the *Prince* nor the *Discorsi* was done into English until 1636,[4] the linguistically uneducated Tudor received his initial and strongest impression of Machiavelli from the work of the Frenchman. Machiavelli entered Elizabethan

[1] E. J. L. Scott (ed.), *Harvey Letter Book 1573-80* (Camden, 1884), pp. 79, 135, 174. The *Arte della Guerra* had been translated into English in 1560, but the other works did not come until later.

[2] By Patericke, 1577. In the Preface the translator gives thanks that "the infectious Machiavellian doctrine hath not breathed nor penetrated the intrailes of most happy England."

[3] "Discours sur les Moyens de bien gouverner et maintenir en bonne paix un Royaume ou autre Principauté: Divisez en trois Parties; à savoir, du Conseil, de la Religion et Police que doit tenir un Prince: Contre Nicholas Machiavel, Florentin. A Trèshaut et Très-illustre Prince François Duc d'Alençon fils et frère de Roy. 1576."

[4] Both translated by George Dacres—the *Discorsi* in 1636, the *Prince* in 1640.

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literature, not as the Florentine statesman, but as the villainous murderer depicted by Gentillet. We need not be surprised to learn that there were no counteracting versions from those better informed. Even today the indisputably correct text, with a history of commentaries at the reader's disposal, has been subject to grave misinterpretation, and at that time the educated Tudor, if he were a dramatist and a popular writer, found the false version more fertile than the true one. The best example is Harvey, who knew the original well and as a scholar should have respected it, yet who submerged the scholar in the pamphleteer and used Gentillet's text because of its more lurid possibilities in drama and invective.[1]

The other pamphleteers, particularly Nashe and Greene, quickly followed Harvey's lead, and it was not long before the term "Machiavellian" assumed the propensities of a popular adjective.[2] It became so flexible in the hands of these scriveners that during the Martin Marprelate controversy it was bandied about by each party to the derogation of the other. The variety of implication was substantially increased by the dramatists. Machiavelli's first appearance on the Elizabethan stage, both as a character and as a word of abuse, was in Marlowe's *Jew of Malta* in 1588. In the plays of Jonson, Marston, Greene, Nashe and Shakespeare, Marlowe's conception, which derived a great deal from Gentillet, was freely drawn upon.[3]

Through the pamphleteers and the playwrights, Machiavelli, by the end of the century, gained the reputation of being a sort of arch-fiend. There was actually no crime in connection with which his name might not be invoked. Thus, we have cony-catching, poisoning, atheism, heathenism, hedonism, avarice, fraud, deceit, selfishness, hypocrisy, treachery and murder; and to make the list well-nigh complete we have Nashe's imputation, in *Christ's Teares Over Jerusalem*, of sexual profligacy.[4]

[1] *Cf. XAIPE: Gabrielis Harveji.* . . . . (London, 1578).

[2] For most of my information on this score I am indebted to E. Meyer's *Machiavelli and the Elizabethan Drama* (Weimar, 1897).

[3] Inasmuch as the reader may consult Meyer's work, already cited, for a full and exact account of this subject, I have not gone into detail nor given specific references to his pages.

[4] Grosart (ed.), *Works of Nashe* (1883-4), vol. IV, p. 231.

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There are altogether about 390 such references to Machiavelli in Elizabethan literature.[1] They bear witness to the usefulness of Machiavelli's name as a metaphor for evil, but as evidence of his political influence they are singularly valueless.

Popular literature, of course, cannot alone be the basis for the historian's statement that "*no work had a profounder influence on the thought and policy of Tudor England than Machiavelli's 'Prince.'*"[2] As regards thought and policy, we must turn to something of a more official nature, and we cannot do better than to start by examining the Tudor state papers.

It should be said at once that the state papers, for what they reveal to us in this respect, are very disappointing. There are scarcely a dozen scattered references to Machiavelli throughout, and most of them are insignificant. We may briefly consider the two of importance. First is a letter from John Leghe to the Privy Council, dated 1540.[3] Leghe mentions advice given to him by Cardinal Pole to beware the works of Machiavelli, which, said Pole, had already poisoned England and would soon poison all Christendom. Since, however, Pole, as will presently be seen, was the most prejudiced of critics regarding Machiavelli in England, his testimony is worthless.

Second is a reference by the gossipy ambassador, Sir Richard Morison—of value only for incidental information it offers about Roger Ascham. Morison states in one letter that he was accustomed to read Ochino's sermons and Machiavelli to his household for the sake of the language.[4] This was at the Emperor's court in 1552, when Ascham was Sir Richard's private secretary. We may, therefore, infer that Ascham's

[1] *Cf.* Meyer, *op. cit.*, Preface.

[2] *The Cambridge History of English Literature,* vol. IV, chap. i: "The Translators," by Charles Whibley. The italics are my own. He goes on: "It was a textbook to Thomas Cromwell; its precepts were obediently followed by Cecil and Leicester. The mingled respect and fear in which its author was held converted him into a monstrous legend." To which *cf.* chap. xv, *idem,* the Venerable Cunningham: "For the most part the great Florentine lay outside the circle of English thought."

[3] Gairdner (ed.), *Letters and Papers, Henry VIII,* vol. XV, p. 721.

[4] Turnbull (ed.), *Foreign Papers, Edward VI* (July 13, 1552).

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knowledge of Machiavelli, as it appeared in his *Report on The Affairs of Germany* and in *The Scholemaster*, was gleaned from Sir Richard's recitations. The first work,[1] published in 1553,[2] shows that Ascham had the popular misconceptions of the Florentine,[3] that he understood very little of his actual writings, and that he heartily disapproved of him—though it must be admitted that at times he seems indebted to Machiavelli for certain shrewd observations.[4] The second work, published in 1568, contains Ascham's celebrated excoriation of Italianate Englishmen and his denunciation of Machiavelli as a Romanist.[5] It is puzzling that Ascham could make this most emphatic enemy of the papacy a papist. His error may now be explained on the assumption that his opinion of Machiavelli was formed by Morison's readings in 1552, and that when writing the *Scholemaster* eleven years later he simply linked his recollected hostility to Machiavelli with hostility to Roman Catholicism.

As far as the state papers are concerned, the influence of Machiavelli in Tudor England may be considered negligible. Such sparsity of evidence in the most important single body of official correspondence is undoubtedly indicative. Contemporary chronicles and letters reveal no more. We have to do, however, not with general witnesses but with the individuals—authors and politicians. Let us, therefore, consider first the political writers of Tudor England and then the statesmen.

No Englishman before Hobbes produced a political philosophy, and none, with the exception of Sir John Fortescue and Sir Thomas Smith, wrote even what may be adjudged a political treatise. Englishmen who paused to consider the nature of the state at all usually confined their remarks, implicitly or

[1] *Works*, ed. by Giles (London, 1864). Vol. III: *A Report and Discourse of the Affairs and State of Germany.*

[2] Sometimes erroneously stated to be 1552. But *cf. op. cit.*, vol. III, p. 22.

[3] *Ibid.*, pp. 49-50, 58, 61.

[4] *Ibid.*, p. 15. *Cf. Prince*, chap. vii; *Discorsi*, Bk. III, chap. iv.

[5] *The Scholemaster* (London, 1743), pp. 70 *et seq.*

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explicitly, to the English state, and wrote at random times in random fashion. We find that this was the method taken by William Thomas—the first of the political commentators to disclose Machiavelli's influence.

Thomas was a clerk in the employ of Sir Anthony Browne.[1] He was obliged to flee from England in 1544, apparently because of embezzlement of his master's funds. He went to Italy, where in four years he became proficient in the language, and wrote an Italian grammar, a history of Italy, and a defense of Henry Eighth, known as *The Pilgrim*. This last work, as well as his linguistic ability, helped him to gain a position on the Privy Council when he returned to England. Shortly afterwards he became acquainted with Edward Sixth, who was then about thirteen, and set himself to become political instructor to the youthful monarch. He sent Edward a list of eighty-five questions on topics that seemed important, offering to write on any or all of them as the King should choose.[2] He eventually sent six treatises.

What strikes us first about Thomas is that he drew so preponderantly more upon the *Discorsi* than upon the *Prince*. His eighty-five questions,[3] in fact, might serve as chapter headings for the *Discorsi*; and if we judge from these and from the essays, Thomas was not even acquainted with the *Prince*. The reasons for his partiality can only be conjectured. It is possible that the Roman commentary appealed to him for its classicism, or that in the authorized edition of Machiavelli's works, which came out in 1532, the *Discorsi* appeared in size if not in context the more important of the two works. At any rate, the result in Thomas' writings is of singular interest. It can be fully appreciated only if the relation between the *Prince* and the *Discorsi* is well understood.

One of the first to note and attempt to reconcile the apparent inconsistency of the treatises was the famous jurist Alberico Gentile, Regius Professor of Civil Law at Oxford. Alberico

[1] "William Thomas," by E. R. Adair. *Tudor Studies* (London, 1924). *Cf.* Strype, *Ecclesiastical Memorials* (London, 1721), vol. II, p. 99.

[2] Strype, *op. cit.*, vol. II, pp. 99 *et seq.*

[3] *Ibid.*

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observed, in his *De Legationibus Libri Tres* of 1585, that Machiavelli was not a protagonist of monarchy but a eulogist of democracy and its most spirited champion.[1] The purpose of the *Prince*, he said, was not to instruct the tyrant, but to strip him bare by revealing his secret counsels and to expose him to the suffering nations.

Wrong as this interpretation may be, it is not as harmful as the more usual one which makes the *Prince* the essence of Machiavelli's political philosophy and the *Discorsi* his random reflections. The *Discorsi*, as a matter of fact, was written intermittently from the time Machiavelli went into exile until his death in 1527,[2] and represents, if anything, his mature and long-pondered reflections. The *Prince* was written in the first year of his exile, for the specific purpose of coalescing Italy into a unified state. In the turmoil which then existed Machiavelli recognized that only the undeviating strength and astuteness of a single individual could accomplish the task. Since he considered moral evaluation irrelevant where the welfare of the state was in question, his methods were not immoral but amoral.

When once the contending forces were peacefully organized and the state as such in existence, its form was to be a democracy. The *Discorsi* dwells upon the glories of Republican Rome and government by tribune. Machiavelli, frowning on mobs, had only praise for the rule of the people.[3] He chose the Commons in preference to the Nobles as guardians of the state's liberty.[4] He even went so far as to choose the Commons in preference to the Prince, though this fact seems generally ignored. It was his observation that an unrestrained multitude was no worse than an unrestrained Prince, but that as between a law-abiding people and a law-abiding Prince, the

[1] Nys (ed.), *De Legationibus Libri Tres* (Oxford, 1924), Bk. III, ch. ix: "Machiauellis Democratiae laudator & assertor acerrimus. . . . . Sui propositi non est tyrannum instruere, sed arcanis eius pala factus ipsium miseris populis nudum & conspicuum exhibere."

[2] *Cf.* L. A. Burd, *Il Principe* (Oxford, 1891), Preface.

[3] *Discorsi*, vol. I, pp. 5-6.

[4] *Ibid.*

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people was wiser and more constant—more honest in its choice of magistrates, more steadfast in its maintenance of tradition.[1]

Thomas is as significant in the way he diverges from Machiavelli as in the way he accepts him. His most important essay from this point of view is his discussion of the relative merits of the Commons and the Nobility.[2] He enters into it from the same premises as Machiavelli, the subject matter being obviously suggested by the *Discorsi*. But he differs from Machiavelli in his regard of the people. The Commons, he asserts, are dangerous, inconstant, ignorant and prone to violence. His preference is emphatically for the Nobles. He grants that the rule of the Nobility might result in oppression of the people, but he points out that the oppression by a few is better than the subversion of the entire estate which would result from popular rule. He sees both these difficulties obviated if the sovereign power be in the hands of a king. The king would place upon the aristocracy the same curb that the aristocracy places upon the people. Thomas accepts the possibility of the king turning tyrant with the argument that the tyranny of one is preferable to the tyranny of several or to mob violence.

Royal rule does not mean, Thomas goes on, that the people are to be oppressed as they are in some countries, but it does mean that they are to be educated and disciplined in such a way that mere mention of the Prince's name will cause them to tremble. If the people possessed power or did not respect a superior power, if they were permitted liberty to talk of the ruler's affairs and the reasons for his laws, they would soon show contempt, disobedience—the mother of all errors—and a desire to revolt.

These conceptions are neither from the *Discorsi* nor from the *Prince*. They are sprung from a distinctively Anglican point of view—from respect for the established order—to which, it is obvious, Machiavelli's limited Italian ideas were impertinent. Thomas took as much of Machiavelli as he could,

[1] *Discorsi*, vol. I, p. 58.

[2] Strype, *op. cit.*, vol. II, Original Papers S.

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but when he arrived at the immediate necessities of England, he was obliged to use his own native experience.

Thomas' admonition against allowing people too much liberty of speech may have been a criticism of parliamentary freedom. He indulged in the same sort of criticism in the preface to his *History*,[1] in which, after stating his purpose in writing as he had learned it from Machiavelli's *Istoria Fiorentina*,[2] his comment was that a prince would deserve more praise who left his realm quiet and wealthy to his successor than one who for conquest of other countries impoverished and upset his own. The author of that statement had in mind not Roman arms and Italian *condottieri* but the Amicable Loan and the French expeditions of Henry VIII.

Of Thomas' remaining treatises, one on the feasibility of shifting with the wind,[3] and another on the friendship of princes,[4] are simply copy-book exercises from Machiavelli, and of little significance. The third—on His Majesty's foreign affairs[5]—which is the most important of the three documents historically, has not the slightest indebtedness to Machiavelli, and strengthens the rapidly-forming conclusion that the Florentine had little grist to offer for the mill of English politics. All the writings of the century, indeed, tend to demonstrate that astute maxims never meant as much to the Englishman as what the exigencies of the country itself dictated.

We may see this fact proved by Leslie, Merbury, and Bedingfield—three writers whose monarchical bent has seemed to Lewis Einstein and others sufficient evidence of Machiavelli's influence.[6] As a matter of fact, no influence could have been

[1] William Thomas, *The Hystorye of Italye* (London, 1561).

[2] To show, namely, the rise and fall of nations and the mutability of fortune, and "how what has been gathered with extreme pains, immeasurable expense, and unreasonable effusion of blood, may be lost in a moment." Thomas further acknowledges complete indebtedness to Machiavelli in his description of Florence, p. 140.

[3] Strype, *op. cit.*, vol. II, Original Papers R.

[4] *Ibid.*, Original Papers T.

[5] *Ibid.*, Original Papers V.

[6] Einstein, *Italian Renaissance in England* (New York, 1903), p. 295. *Cf.* also *Tudor Studies, loc. cit.*, p. 155.

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a more powerful argument for monarchy than the memory of the War of the Roses and the fear of another war of succession. John Leslie, Bishop of Ross, friend and ambassador of Queen Mary of Scotland, in his *Defense of The Honor of Queen Mary*, 1569, compared the king's rule of the nation to God's governance of the world.[1] He gave warning against the bloodshed, the dissension, and the anarchy consequent upon wars over the crown, and he sternly advised, to avoid such catastrophe, that Mary be assured of her title to the crown of England. There was certainly no need to turn to Machiavelli when everything Leslie could say was inherent in the situation itself. His use of Machiavelli's name, in describing "factious competitours" to the throne,[2] slanderers of the queen,[3] and the activities of Moray in connection with Darnley's death,[4] shows only that he viewed Machiavelli with the contempt of a Catholic versed in the popular tradition. It is a contradiction to imply that, despite such animosity, Leslie took Machiavelli for a guide. If we wish to be certain that he had his own very un-Machiavellian ideas on royalty, we may read in his report on his embassy to England that Princes are "ministers appointed by God to keepe their people in good order, exercisinge justice tempered with clemencie, as judges and fathers to their subjects."[5]

As for Charles Merbury, a case similar to Leslie's has been argued, with somewhat more surface evidence though with no more foundation. Merbury had been to Italy and learned Italian. In 1581 he published a defense of absolute government to which he appended a series of Italian proverbs.[6] Among these there is not a syllable of Machiavelli. Inasmuch as the *Prince* is noted for a terse, epigrammatic style, particularly adaptable to quotation, and inasmuch as the authors rep-

[1] Anderson, *Collections Relating to the History of Mary Queen of Scotland*, in four volumes (Edinburgh, 1727), vol. I.

[2] *Ibid.*, vol. I, p. 13.

[3] *Ibid.*, vol. I, p. 1.

[4] *Ibid.*, vol. I, p. 68.

[5] *Ibid.*, vol. III, p. 86. The report covers the years 1568-72.

[6] Charles Merbury, *A Briefe Discourse of Royall Monarchie, As of the Best Common Weale* (London, 1581).

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resented include Ariosto, Boccaccio, Castiglione and Guicciardini, this omission seems significant. In the treatise itself the same conspicuous absence of Machiavelli persists. Merbury discusses government according to Aristotle, shows a contempt for the people like that of Thomas, and chooses monarchy as the happiest form of government from his own experience. A democracy, he asserts, is no better than universal confusion—"a horrible monster of many heads without reason."[1] The dangers of a doubtful succession he points out as Leslie did, and like Leslie he stresses the divine sanction conferred upon kings. He maintains that the Prince, as an image of God on earth—"*un minor essempio* of his almightie power"—, cannot acknowledge any authority greater than his own.[2] The source of this remark is the Fourth Book of Castiglione's *Cortegiano*, the language being almost identical.[3] Machiavelli, let us note in conclusion, does not enter the discussion.

The third writer, Thomas Bedingfield, is of importance solely for his translation of Machiavelli's *Istoria Fiorentina* in 1595.[4] It is a ready supposition that any political conceptions Bedingfield states, he must have derived from Machiavelli, especially because of his disparagement, in the Preface, of all forms of government save monarchy. But the supposition has no support from the facts. If we glance at the authors already quoted, we shall discover other sources than Machiavelli for Bedingfield's arguments that democracy is a monster of many heads, devoid of reason and judgment; that kingship is God-ordained; and that a people is fortunate which God has destined to live in a "successive royal monarchy."[5] They certainly bear little resemblance to any views of Machiavelli. Succession was a particularly Anglican problem with which

[1] *Ibid.*, p. 20.

[2] *Ibid.*, p. 43.

[3] Castiglione, *The Courtier*, trans. by Hoby (1561). In *Tudor Translations* (1900), Bk. IV, p. 314.

[4] Bedingfield, *The Florentine History of Nicholas Machiavelli*, in *Tudor Translations* (London, 1905).

[5] This discussion appears in the Preface.

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Machiavelli had little concern, and the divine origin or attributes of sovereignty he never considered.

What Thomas, Leslie, Merbury and Bedingfield have manifested is a preoccupation with native problems, to which Machiavelli was alien and unnecessary. We find this attitude signally exemplified in Sir Thomas Smith's *Commonwelth of England*[1]—the single genuinely noteworthy English political treatise of the period. Sir Thomas had all of Machiavelli's works in his library, and had every opportunity to use them if they were pertinent.[2] Yet he apparently ignored them. In his discussion of the nature of government Sir Thomas drew upon Aristotle; in his discussion of the government of England he went straight to sources. The second part of his treatise is Anglican through and through, and it seems far indeed from Machiavelli when Sir Thomas at one point says of the English:[3]

> The nature of our people is free, stout, hault, prodigall of life and blood; but contumelie, beatings, servitude, and servile torment and punishment it will not abide.

The historian, writing of Machiavelli in connection with Renaissance English statesmen, usually speaks of his influence on "Thomas Cromwell and others." From time to time the "others" have been more specifically referred to as Burleigh, Leicester, Warwick, Sir Christopher Hatton and Walsingham. The evidence in regard to these men being vague, the supposition has been accredited chiefly, as we remarked at the beginning of this paper, for its reasonableness. In the case of Cromwell, however, the definite statement of a contemporary has seemed to remove any cause for doubt.

Cardinal Pole, in his *Apologia ad Carolum Quintum*,[4] relating a conversation between Cromwell and himself at Wolsey's

[1] Sir Thomas Smith, *The Commonwelth of England* (London, 1589).

[2] *Cf.* Strype, *The Life of the Learned Sir Thomas Smith* (London, 1698), Appendix.

[3] Smith, *op. cit.*, p. 101.

[4] Pole, *Epistoli* (Brixiae, 1744), p. 136.

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house in 1528, or 1529, said that Cromwell advised him to forsake Plato and idle theorists and read the works of an experienced, practical man. This man, Pole later learned, was Cromwell's favorite—Machiavelli. Cromwell also informed him that a politician's astuteness consisted in ferreting out his sovereign's true inclinations beneath his pretenses, and in formulating ways by which the sovereign may satisfy his appetites without offense to the religious or moral notions of the people.

It is no exaggeration to say that upon this declaration of Pole's has been established Machiavelli's influence, not alone on Cromwell, but, by a species of historians' comparative method, on all sixteenth-century English statesmen.

The character and political principles of Cromwell in many respects lend themselves to the adjective Machiavellian. A man as astute as he, as unscrupulous, and as ruthless; who advised the king to make his will the law;[1] who praised the sultan for the power he wielded over his subjects;[2] and who vowed he would make his ruler the richest monarch in Christendom,[3] has all the earmarks of a careful education in the school of the *Prince*. These characteristics, linked with Pole's statement, have made Cromwell the most advertised disciple of Machiavelli—with the possible exceptions of Catherine de' Medici and Frederick the Great—in history.

It is curious that until the present century Pole's assertion has never been questioned. Yet if there were two distinctive elements in Pole's *Apology*, one was his hatred for Cromwell and the other his hatred for Machiavelli.[4] The conjunction of their names should prove a signal for cautious investigation. Pole considered Cromwell responsible for his forced departure from England and for the persecution of his relatives after he left. His feelings toward Henry's minister became such that almost any slander was possible.

[1] Foxe, *Acts and Monuments*, ed. by G. Townsend (London, 1843-49), vol. VI, p. 46.

[2] *Letters and Papers, Henry VIII*, vol. VII, p. 1554.

[3] *Ibid.*, vol. VI, p. 1445.

[4] Pole, *op. cit.*, p. 151.

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The discrepancies in this particular slander have been ably analyzed by Mr. Paul Van Dyke.[1] It is Mr. Van Dyke's contention that, in finding the *Prince* to be the book to which Cromwell referred, Pole's wish was father to his thought, and that what Cromwell probably had in mind was not the *Prince* at all but Castiglione's *Cortegiano*. In the first place, Mr. Van Dyke points out, Pole's statements, based on the attitude of an expatriate whose relatives were being persecuted, are hardly compatible with the situation as it existed in 1528. Pole implies that at that time there was something opprobrious in owning the *Prince*, despite the fact that four years later the first publication of Machiavelli's works, by Pole's own publisher, was accorded papal patronage. Pole asserts that "he sought out the book as carefully as one seeks out the despatches of the enemy to know his plans." But in 1528 Cromwell was far too unimportant to inspire such activity. Pole claims that this indication of Cromwell's true nature and his fear of Cromwell's subsequent rise to power drove him to leave England in 1531. Yet Cromwell was not powerful enough to gain the notice of ambassadors until 1533; and for Pole's leaving there are other and more cogent reasons. What is more, at the time of the conversation Pole did not know the name of the book to which Cromwell had reference. He learned it only later.

Secondly, Mr. Van Dyke notes, manuscripts of the *Prince* were very rare;[2] on the other hand, we know that Cromwell actually possessed a copy of the *Cortegiano*, which had just been published and met with tremendous favor. Thirdly, as regards the subject matter of the conversation, we know that a prudent counselor's attitude toward his ruler is not mentioned in the *Prince*, but in the *Cortegiano* is discussed at length. Cromwell's point ot view, as described by Pole, may appear to lean more toward Machiavelli than toward Castiglione, but

[1] P. Van Dyke, *Renascence Portraits* (New York, 1905), Appendix. Because of its importance for our subject, I have taken the liberty of giving a brief summary of Mr. Van Dyke's arguments.

[2] Nor could Cromwell have obtained a copy while in Italy himself, since he returned a year before it was finished.

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Pole's description, under the circumstances, is hardly trustworthy. Finally, we have a letter of Henry Parker, Lord Morley, who knew Cromwell intimately, in which he offered him a volume containing the *Istoria Fiorentina* and the *Principe* as something Cromwell had never seen before—in 1539.[1]

The disproof of Pole's testimony does not, of course, preclude the possibility of Cromwell's owning the *Prince;* but we have no other evidence in support of such a possibility, and it is the business of the historian to make statements of fact based on fact and not on conjecture. The result of our inquiry is to demonstrate that our only definite witness is one who in this respect should have been distrusted from the outset and whose assertion holds no water.

As to the other statesmen, popularly placed under Machiavelli's influence, testimony is even more nebulous. We may begin with the Earl of Warwick, who has been called by Mr. A. F. Pollard one of Machiavelli's subtlest and most daring English disciples.[2] Not a bit of evidence exists to show that Warwick was even acquainted with the works of Machiavelli. Our contention is not that he was ignorant of them but that we cannot postulate their influence unless we have some record of it—no matter how slight. Leicester, for example, was called Machiavellian by contemporaries. In the anonymous pamphlet entitled *Leycester's Commonwealth*, 1588, he was accused of several Machiavellian practices.[3] This work, however, is such a gross libel that it can be given no credence.[4] The only thing it proves is that Machiavelli was well read by its unknown author. From its pages were subsequently derived most of the

[1] This letter, which may be consulted in Ellis, *Original Letters,* 3rd series (London, 1846), vol. III, p. 63, is sometimes dated 1537, but the difference, as Mr. Van Dyke observes, is not important for the purpose of our argument.

[2] Pollard, *England Under Protector Somerset* (London, 1900), p. 284.

[3] *Leycester's Commonwealth: Secret Memoirs of Robert Dudley, Earl of Leicester,* ed. by Drake (London, 1706). *Cf.* pp. 110, 182, and 215.

[4] Among other things, Leicester was accused of being the most dangerous man in the realm, of thwarting all the Queen's marriage projects, of murdering his wife and the Earl of Essex, of poisoning anyone who stood in the way of his possessing a woman, of striving to obtain the royal supremacy for himself, and of surpassing in lust Sardanapalus, Nero, and Heliogobalus.

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blots on Leicester's name with which we are now familiar—as, in fact, Naunton's attribution of Machiavellianism to him, in his *Fragmenta Regalia*.[1] But apart from Naunton and the pamphlet, we have no more real evidence concerning Leicester than we have concerning Warwick. As to Sir Christopher Hatton, we have even less. According to Bedingfield's dedication of his English translation of Machiavelli's *Istoria Fiorentina*, Hatton had previously read the *History* in Italian. Aware of Hatton's connections with literary and university men,[2] we are justified in suspecting that he must also have read the *Prince* in Italian. But search his correspondence as we will, we cannot find a mention or a maxim of Machiavelli.

Regarding Walsingham, we have the reported statement of James I, then James VI of Scotland, that he was "a very Machiavellian," for he had counseled him, James, to use religion to gain the obedience of his subjects.[3] Two questions are raised by this assertion: first, whether the statement does not point to the King's knowledge of Machiavelli, direct or indirect, rather than to Walsingham's; and second, whether the advice, if given by Walsingham, was not inspired more naturally by Walsingham's own astute observations than by his study of Machiavelli. But if the king was right—if Walsingham was under Machiavelli's influence—Walsingham himself should give some indication. We seek in the state papers, in the collected correspondence of his embassy to France in 1572,[4] in all documents touching upon him, and we find nothing.

We might continue this line of inquiry through other prominent men of the period, and find the same results; but the investigation would grow monotonous. We cannot, however, omit mention of Lord Burleigh. Elizabeth's Lord Treasurer has been cited as a disciple of Machiavelli because he had the Florentine's books in his library and because he used his max-

[1] Sir R. Naunton, *Fragmenta Regalia,* ed. by Arber (London, 1870), p. 29.

[2] Especially of Cambridge, as, e. g., Spenser.

[3] Conyers Read, *Mr. Secretary Walsingham* (Cambridge, 1925), vol. II, p. 221. Mr. Read states that "the Prince became the guidebook for statesmen in all the courts of western Europe."

[4] Digges, *The Compleat Ambassador* (London, 1655).

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ims in one of his papers. As a matter of fact, the only evidence we have of Cecil's ownership of Machiavelli's works show that he never received the copy he ordered.[1] What is important, however, is not whether Cecil owned the *Prince* but whether it had any influence on him. Cecil's writings themselves do not indicate the slightest Machiavellianism, except for the one paper already mentioned—a memorial to the Queen about the Catholic Malcontents, appearing in the Somers Tracts under Burleigh's name.[2] This document has since been quite definitely attributed to Bacon.[3] Even if the paper were Cecil's, its use of sententious phrases garnered from the *Prince* cannot serve as illustration of the vital effect of Machiavelli on Burleigh's mind any more than could the statement of Mussolini that "the concessions of the weak are the concessions of fear" or that "a great empire and little minds go ill together" serve as illustration of the vital effect of Burke on Mussolini's mind. Besides, as Lord Morley remarks, "Burleigh may very likely have read the *Prince*, but it is going too far to assume that a sage statesman must have learned the commonplaces of political prudence out of a book."[4]

There remains for consideration only Elizabeth herself. W. Alison Phillips in an article in the *Nineteenth Century Magazine*[5] claims that Elizabeth was a student of Machiavelli on the grounds, first, that "there is a certain theatrical aspect about both her private and public life, which seems to show that she was acting a carefully studied part" (and in support of this he quotes Mundt as to the dramatic aspect of the *Prince*—"It is more the question of the study of a part than of a consistent doctrine"); secondly, that she followed the Machiavellian doctrine of consolidating the people by unifying

[1] *State Papers, Foreign, Edward VI,* nos. 516 and 522.

[2] *Somers Tracts,* 4th series (1752), vol. I, p. 101.

[3] By Spedding, *Bacon's Works* (vol. VIII, p. 43) as a probability; by E. A. Abbott (p. 20), and S. R. Gardiner, "Francis Bacon," in *Dictionary of National Biography,* as indisputable.

[4] Morley, *Miscellanies,* 4th Series (London, 1905). Note 5 on "Machiavelli," p. 324.

[5] December, 1896, p. 907.

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them in national conflict with a rival power; and, lastly, that the change wrought by the Queen in bringing England from Catholicism to Protestantism had been effected, as Machiavelli advised, by keeping the shadows of the old institutions while actually introducing new ones.

These arguments are too specious to merit contradiction. The absurdity of the first is palpable. The second and third may be maintained only on the assumption that the most inevitable processes of political evolution in the sixteenth century were the results of Machiavelli's teachings. As to Phillips' statement that the intricacies of Elizabeth's policy "appear to have been based on some consistent theory of statecraft," we have only to read any history of the period to realize that Elizabeth's main concern was how to keep her head above water. "'Now, Mr. Speaker,' said Elizabeth once, 'what has passed in the Lower House.' Mr. Speaker answered, 'May it please your Majesty, seven weeks.' In like manner," comments Seeley, "what passed in Elizabeth's reign was chiefly forty-four years." [1]

All the evidence that can be adduced leads to the conclusion that Machiavelli had no appreciable influence on the thought or policy of Tudor England. The general supposition to the contrary results from certain ostensibly reasonable assumptions which are in reality fallacious. It has been assumed, for one thing, that because Machiavelli was an exponent of nationalism, of state supremacy, and, in the *Prince*, of royal absolutism, we must attribute directly to him all manifestations of these tendencies throughout sixteenth-century Europe. It has likewise been assumed that Machiavelli was the source of all the cunning, unscrupulousness, and disregard for morality among subsequent European statesmen; that, to use the words of Lord Acton, he paved the way for "absolute monarchy to triumph over the spirit and institutions of a better age . . . by a studied philosophy of crime." [2]

"A studied philosophy of crime" is eloquent but thoroughly

[1] J. R. Seeley, *The Growth of British Policy* (Cambridge, 1922), p. 248.

[2] Lord Acton, *History of Freedom and Other Essays* (London, 1907), p. 41.

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false. As far as Machiavelli or his successors are concerned, it hits wide of the mark. Machiavelli, though he philosophized frequently, was the least philosophical of politicians. Indeed, we invoke his name to characterize thinkers and statesmen who are pragmatists rather than theorists. The only metaphysical principle explicitly stated by Machiavelli is that human nature is fundamentally and pervasively evil. Upon this conviction he discusses at random the task of one who would be a ruler of men. The conviction is at the basis of the *Discorsi* as well as of the *Prince*, and, consequently, though the one work is democratic and the other monarchical, both maintain the same attitude as regards methods to be adopted. There is nothing malicious or studied in these methods: they are unashamedly advocated by Machiavelli as the only means of attaining what to him appeared the supreme goal.

By many of his successors who had the same goal similar methods were employed—quite as simply and directly, and with just as little "studied philosophy of crime." The question will naturally occur to the reader, why, if we find such similarity exists between Machiavelli and his successors, we should hesitate to subscribe to the historians' opinion that the first is cause and the second effect? The answer is that we may find equal similarity between Machiavelli and his predecessors—that we can see greater resemblances between Machiavelli and Louis XI, Ferdinand the Catholic, Henry VII, Pizzaro and Cortes than between Machiavelli and Thomas Cromwell.

For Machiavelli, after all, was an expression of his age. His achievement was to epitomize the political activity, not alone of the Italian Despots, but of Renaissance England, Spain and France. It was not the novelty of what he said that gave his words power but their fidelity to the fact. All he did was to seize upon certain aspects of that epoch and describe them—with such keen analysis, such profound observation, and such brilliant characterization that his name has become indelibly impressed upon all similar manifestations regardless of chronology or geography.

We must recognize, therefore, that similarity can no longer be accepted as reasonable assumption of causation, and that the

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term Machiavellian, whether applied to Thucydides or Mussolini, merely connotes the attitude or the qualities of character which are associated with Machiavelli's ideal of the successful ruler.

It is necessary to see at once that the viewpoint of the *Prince*, though shrewd, is extremely narrow. The force of its theory is limited in that the state is conceived as an end in itself without regard for the ultimate happiness of the people. The utility of its methods is limited because, for one thing, they are extremely localized; for another, because they derive from the proposition that man is a thief and that one must be a thief to catch a thief; and, finally, because they are directed to the founding of a *new* kingdom by a *new* prince. As a manual of practical advice, which, according to the historians, was the office of the *Prince* to European statesmen, it could have been of singularly little use—especially in the England of Sir Thomas Smith and Elizabeth. As a theory of state-sovereignty it could provide only an affirmation of a principle which had been successfully carried out before its promulgation.

It is paradoxical in Machiavelli that his work represents historically the end of an epoch and intellectually the beginning of one. The state-sovereignty for which he had been struggling was achieved in most European countries by the end of the sixteenth century. His realistic attitude toward the state and man had only just begun. While Machiavelli circumscribed his potential influence by the narrowness of his horizons, the incisive shrewdness of his observations remains vital whenever and wherever the background resembles that from which his thoughts sprang. As his more modern students we may point to Frederick the Great and Mussolini. Certainly if "Deutschland Über Alles" and Fascism are not directly inspired by the *Prince*, they are in many ways akin to it in spirit. We need only the proper soil to find that Machiavelli's ideas will again take quick root. But in Elizabeth's England Machiavelli was definitely extraneous.

L. ARNOLD WEISSBERGER

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REVIEWS

Political and Industrial Democracy, 1776-1926. By W. JETT LAUCK. New York and London, Funk and Wagnalls Company, 1926.—x, 374 pp. $2.00.

This is a stimulating and useful book. Many writers have emphasized the contrast between our political democracy and our industrial autocracy, but it remained for Dr. Lauck to analyze current employee-representation plans and point out clearly the features that make most of them essentially autocratic but a few of them, a saving few, really democratic. As Secretary of the former War Labor Board, which introduced so many plans of employee representation, Dr. Lauck has had unusual opportunities to study the problem. To wide knowledge, he adds confident belief that industrial democracy will some day "encompass the earth," that "this is inevitable". He realizes, however, that its progress must be slow, since its introduction requires a change in the usual attitude of wage-earners as well as of employers. Both must substitute wholehearted cooperation for their present attitude of distrust and antagonism, and such a change can only come gradually.

After tracing the progress of opinion favorable to industrial democracy during and after the war, he discusses in chapter iii the conditions necessary to its realization. These he considers to be: (1) a really independent organization of the employees to exercise a voice in the control of industry; (2) adequate wages; (3) working conditions compatible with health and efficiency; (4) cooperative machinery for determining wages, hours and other working conditions and for adjusting disputes; (5) assignment to workers of a fair share of the added profits due to their increased efficiency; (6) provision for the collective acquisition by the employees of an increasing share of the voting securities of their corporations.

With these definite criteria of industrial democracy in mind, he proceeds in chapters iv, v and vi to describe and analyze the twenty-two most notable examples of employee representation now in operation in the United States, including the plans of the Pennsylvania Railroad, the Standard Oil Company of New Jersey, the Colorado Fuel & Iron Company and others, which he considers autocratic,

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along with the plans of the Baltimore and Ohio Railroad, the A. Nash Company, the Dutchess Bleacheries Company, the Philadelphia Rapid Transit Company and a few others which he believes satisfy the requirements of industrial democracy, at most, if not at all points. From this comparative study, Dr. Lauck concludes that the two plans most worthy of imitation are those of the A. Nash Company, and of the Philadelphia Rapid Transit Company. The first, he considers, since the unionization of the employees early in 1926 on the initative of Mr. Nash himself, "one of the most perfect forms of industrial democracy so far as spirit and achievements are concerned", while in the second he finds "the best general constructive basis for industrial democracy now in operation". The feature of the Philadelphia Rapid Transit, or "Mitten", plan, that particularly appeals to him is the arrangement by which the surplus wages assigned to the employees are invested by trustees in the voting securities of the Company until they now own more than one-third of the common stock and a substantial block of the preferred. With ownership of the other shares diffused, this gives the employees, through their trustees, virtual control, thus realizing the author's sixth condition necessary to industrial democracy.

Most economists will agree with Dr. Lauck in advocating the highest development of industrial democracy that is compatible with industrial efficiency. The crux of the problem is how far can control by the workers be carried without seriously or even disastrously lessening the efficiency on which the welfare of all vitally depends. Undoubtedly the Philadelphia Rapid Transit Company has been highly efficient under Mitten management. Also investment of the earnings of the employees collectively in the shares of the Company has been highly advantageous so long as Mr. Mitten has retained their entire confidence, since it has served to strengthen his control. But will the investment of still further millions of dollars of the savings of the employees until they collectively own an actual majority of the voting securities of the corporation and are responsible, through their trustees, for the selection of Mr. Mitten's successor, prove safe and wise? And if safe and wise for the employees of a street railway system, relieved through its franchises and the nature of its business from the aggressive competition of rivals, would it be so for the employees of a manufacturing company? Mr. Lauck makes a comparison between the Mitten plan and the Ford plan, very much to the disadvantage of the latter because of Ford's autocratic control of his business. He says noth-

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ing of the task which now confronts Mr. Ford, who has been compelled in recent months to spend tens of millions of dollars in re-equipping his factories to make the new model of Ford car which he, with the help of his engineering staff, has decided is best calculated to win back the market which rival manufacturers are invading. Can anyone picture a Ford Company administered by trustees representing ownership of a majority of the stock by the rank and file of the employees succeeding in the titanic struggle which Mr. Ford's very success has imposed upon him? Is it not, on the contrary, clear that the success of actively competitive manufacturing industries depends vitally upon direction by enterprisers, whose energy, ambition and gift for making right decisions at critical periods and acting upon them fearlessly and vigorously, would preclude them from accepting long the restraints that "industrial democracy" would impose upon them? We tolerate these limiting conditions in our political life, because we believe that education of the citizen in self-government is even more important than efficient government. It will, many of us believe, be wise for us to accept them more and more in connection with public service industries, where some relaxation in efficiency may be compensated by the greater emphasis on service which we may reasonably expect from democratic management. But for industries that are not yet standardized and in which the general interest is best served by a free field for competitive experimentation would the substitution of outright democratic control, for the autocratic control that has contributed so greatly to our past progress in efficiency really be desirable? Dr. Lauck assumes that it would be. The reviewer cannot bring himself to that opinion. But from a practical standpoint this is almost an academic question. Dr. Lauck finds only four or five important establishments in the whole United States which are owned and operated by the employees. For the vast majority of enterprises industrial democracy means as yet not control of the business by the employees but merely some effective voice in the determination of wages, hours and those other conditions that are their immediate, personal concern. The author gives abundant evidence from the experience of the plans he reviews, that withdrawing these problems of management from autocratic dictation and subjecting them to democratic, in the sense of joint cooperative, control, will increase rather than lessen the efficiency of industry and benefit not only employees but also employers and the public.

HENRY R. SEAGER

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The Labor Problem in the United States and Great Britain. By WARREN B. CATLIN. New York, Harper and Brothers, 1926. —x, 659 pp. $3.50.

The labor problem, says the author, is of vital interest to three major groups in society and may be approached primarily from the point of view of any one of these three. The employer is interested in a lower labor cost. Under modern conditions, with labor turnover, restriction of output and strikes, and with complicated alternative ways of dealing with these phenomena, a successful labor policy has become for him a fine art. The public is vitally concerned in the security of the consumer, in the preservation of the peace, and in the safety, health and morals of the industrial population. The workers are interested in securing a richer, broader life. Within labor's own ranks there is a wide range of views as to objectives and methods. But all agree in their dissatisfaction with present conditions and the present distribution of wealth.

The thing that most impresses one is the author's objectivity. Approaching the problem primarily from the point of view of the workingman, he never loses the point of view of the employer nor of the public. From his position outside the labor movement and with the outlook of all the interested parties constantly in mind, he is able to paint the labor problem with sober dispassion and to subject labor activities to a sympathetic criticism in their light "as others see them". To insure a judicious treatment doubly, British problems and policies are compared at all important points with those of the United States.

The author first examines the causes of discontent and seeks "to determine how far the complaints and claims of labor are justified." He then goes on to trace the development of the different branches of the labor movement and their relationships. He considers trade unionism, its structure and government, its tactics, and its working rules. Next, he takes up labor politics, including labor law, labor legislation and labor parties. Finally "collectivism" is subjected to inspection in chapters on cooperation and socialism. The author closes each of these main divisions of his subject with an appraisal. In his final chapter, entitled "A Working Creed", he summarizes these conclusions and gives the essence of his philosophy.

Social values are "always to be more highly regarded than economic or financial", and "the public service is always paramount

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to all individual or group interests." The state should set up and enforce minimum standards. Through legislation it can do much that can be accomplished in no other way. Employers are a desirable force for conservatism, but their opposition to labor legislation is often short-sighted and prejudiced. Trade unions in this country have shown good judgment in refusing to be drawn into an independent labor party—likely to become "an organized appetite for office". Also, they are not totally mistaken in their intuition that much labor legislation is paternalistic and jeopardizing to their virility. However, they have an exaggerated notion of the conflict between economic and political action. At all events the public must promote labor legislation for its own sake.

Nevertheless, upon industry itself must rest the largest part of the burden of achieving satisfactory conditions and amicable relations between its members. To this end and as a compensation for the monotony and craftlessness of their jobs, employees must be given a larger participation in industry. Unionism is a very useful agency in "forcing some recognition of the right of collective bargaining and must continue to exist and to grow as the defender of the interests of labor which are really not identical with the interests of the employer." Moreover, unionism promotes assimilation, prepares for democratic institutions, and serves as a valuable correction for a commercialized press and corrupt politics. However, unions have made limited progress, and they are "prone to overemphasize rights and differences and not to be ready to cooperate where cooperation is desirable." Under these circumstances employee representation plans serve a useful purpose. Granted that they are not always introduced from honest motives and that they can never be strong enough to safeguard labor's interests completely, they may nevertheless promote harmony and efficiency and serve as a foundation for something more advanced.

It is of course impossible even in a book on "the labor problem" to treat fully everything that concerns workingmen. The author gives no more than casual mention to left-wing labor movements, employers' associations and industrial mediation and arbitration. More significant is the scant attention paid to workers' education, labor banking and union-management cooperation. The last named, especially, it would seem, deserved more recognition in the author's treatment of restriction of output.

The author's statement that the 1925 wage declaration of the American Federation of Labor represented a concession to the marginal productivity theory of wages is also open to criticism.

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Although well supplied with facts, both qualitative and quantitative, Professor Catlin's book is very readable. The author is conservative but tolerant and impartial. The book should help to create that "higher order of industrial statesmanship both among employers and employees" which the author says is needed.

JOHN R. COMMONS

UNIVERSITY OF WISCONSIN

The Writing of History. By JEAN JULES JUSSERAND, WILBUR CORTEZ ABBOTT, CHARLES W. COLBY and JOHN SPENCER BASSETT. New York, Charles Scribner's Sons, 1926.—xii, 143 pp. $1.50.

Seven years ago, the council of the American Historical Association appointed a committee of four, consisting of His Excellency Jean Jules Jusserand, ambassador from France, Dr. Charles William Colby, Professor Wilbur Cortez Abbott and Professor John Spencer Bassett, to examine the condition of historical writing in America and to suggest ways in which it might be improved. The committee decided to treat the subject under three heads: "An examination of the existing situation, with some discussion of how it came about; the consideration of style of expression in historical writing," and finally, "the training of historians in expression, involving an examination of the rôle that is being played, or may be played, by the history departments in our universities, where historical students are prepared for their careers". These three assignments fell to Professor Bassett, Dr. Colby and Professor Abbott. The committee felt, and justly, that the three parts of the report "needed something to bind them together and the chairman of the committee [M. Jusserand] was urged to write such a summation". The report consists, then, of a group of four essays.

The committee agrees that history as written today lacks literary quality and is defective in form. They have various explanations for this state of things. The German historical method, that would raise history to the rank of a science, imported into America, has turned the historian into a searcher for trustworthy information, and this information is poured forth without form or organization. Ranke, who is called by Gooch, "the greatest historical writer of modern times", is, according to Professor Bassett, the father of "informational history." Another cause of poor historical writing is found by Professor Bassett in the fact that the writing of history has fallen into the hands of college professors who do not belong

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to the same social class as the Prescotts and Motleys; they lack culture and leisure and, as a consequence, they lack aesthetic sense; their work is mechanical. Professor Bassett is also convinced that the modern historian takes too many notes and is too dependent upon them. His writing reeks of the shop. He has too much to say about historical criticism and is too prone to explain to the reader how he reached his conclusions—things that are no more interesting to the reader than the sight of the cook preparing the dinner is to the diner; "the cook has to peel his potatoes", M. Jusserand tells us, "but he does not peel them on the dining room table". All of which is interesting, but not very much to the point.

Some of the members of the committee touched the very heart of the problem when they asserted that historical writing today is lacking in form, for history is not history without form. Professor Abbott comes as near as any member of the committee to seeing what the real trouble with historical writing is and how to remedy it, but he does not pursue the subject far enough to clear it up. He complains, and justly, that university students, future historians, are allowed to present, in the classroom, the results of their investigations in the shape of unorganized material; that they receive no training, or little training, in the last stage of the historical method —the very goal of historical work—historical synthesis. He suggests, and other members of the committee likewise suggest, that the student should read the works of the great historians, but they do not make clear what the chief object of such reading should be from the point of view of historical writing. Evidently the object should be to learn by example the technique of historical synthesis, and such knowledge can be acquired the most readily by the study, as wholes, of great historical works.

From this it does not follow that history is literature, nor that it must become literature before it can become interesting, nor that the historian must take fewer notes or make less use of notes in the contruction of his synthesis and eliminate footnotes and the discussion of evidence from his book. The committee slurs over the distinction that should exist between histories written for scholars and histories written for *tout le monde*. The critic who sacrifices footnotes, critical bibliographies, critical studies of the sources and explanations of the reasons for his conclusions, because such things bore the general reader—and he wants to be read by the multitude—may reach his goal, but he calls down on his head, and deservedly, the condemnation of his fellow historians. His work must be done

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over again and the results formulated so that they may be used by scholars, for it is upon work of that kind that progress in historical writing depends. The general public and the smaller group of historical scholars are two birds that cannot be hit by the same stone, as a rule. There are some exceptions. There is a fairly large group of readers, not the "general public", but a group larger than the group of historical scholars, that will read a book with footnotes. The pages of Prescott and Motley abound in footnotes and one of the most popular histories of our day, Bryce's *Holy Roman Empire* fairly swarms with footnotes and (horror of horrors!) footnotes in Greek, Latin, French, Italian and German; and yet it has never been said that Bryce lacked style, whatever that may mean in connection with historical writing.

The real trouble with much of the work passing as history today is that it consists of masses of unorganized or poorly organized past social facts and, in so far as the material is not organized as a whole, its significance is not evident and for that reason it is uninteresting. The fundamental thing in historical writing, as in literature in the narrower sense, is structure. The would-be historian could profitably read and reread what Walter Pater has said, in his essay on "Style", of the importance of structure in style.

The most important technical problem for the historian is that of historical structure, of historical synthesis, and the report of the committee will not make an important addition to the literature of the subject. In truth, from the reading of these essays the reader would hardly be conscious that such a problem exists and not at all aware that a large literature upon it is to be found in German, French and Italian. This is a characteristic American attitude. For a generation France has possessed a review, *La revue de synthèse historique*, devoted exclusively to problems of historical synthesis; in this country, we are hardly aware of such problems, or if vaguely conscious of them, we treat them in an amateurish manner as questions of literature or style, in the narrower sense.

This failure to understand that history means structure is, in my opinion, largely due to the influence of natural science, whose method of organizing facts is the direct antithesis of the historical method. The present generation of historical writers has grown up under the influence of the idea that no study can be scientific that is not devoted to the search for laws. That idea, if applied to the study of past social facts, may produce good sociology, but it certainly will not give us history. The Prescotts, the Motleys and the Parkmans lived and

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wrote before the method of natural science had become the dominating method in the intellectual life of America. *The Rise of the Dutch Republic, The Conquest of Mexico, The Oregon Trail*, had nothing to do with laws, but they had everything to do with life as history.

Leopold von Ranke is not responsible for the fact that the younger generation of historians in this country has so little historical vision. No historian that ever lived realized more fully than Ranke the significance of structure in history; his works are models for the student of history. It is high time that we stopped repeating the nonsense which started with Lamprecht, that Ranke's ideal was to show "*wie es eigentlich gewesen*" and not "*wie es eigentlich geworden*"; we should stop repeating it for the simple reason that it is not true. Ranke's skill in synthesis was uncanny. "When Ranke", writes Professor Wilhelm Bauer, "on the basis of very defective and, in part, very partisan source material (reports of the Venetian ambassadors), with the certainty of a somnambulist, was able to sketch in bold lines historical developments, leading personalities, influential currents of thought, in such a manner that the fortunate users of richer archives, at a later period, were able to add only slight traits, only shades of meaning here and there, he gave proof that he possessed that mysterious light of the creative force." This power of insight and combination every historian must possess in some degree, if he would create anything great and enduring; "otherwise he remains a sort of subordinate historical assistant".

I suspect that much of the so-called historical work today is done by "subordinate historical assistants." With those who possess the imagination and the constructive power, but lack the technique, something may be done in the university. Let them be taught that history is not a natural science and that search for material, criticism of material and the determination of the facts are simply means—indispensable means, to be sure—to an end. Let them be taught also the necessity of seeing the past not simply as economic, political, artistic, or religious development, but as the unfolding of man's social life in all its many-sidedness. That is the significance of the suggestion of Dr. Jameson, in a letter printed by Professor Bassett, that the student of history should study something besides history; should acquaint himself with human culture, with science, literature, art, music, philosophy and religion, as well as with economics and political life. When he sees the past as a complex, vital and changing whole and understands the significance for the whole of the period

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he is studying, he will have little difficulty in presenting this period in an interesting way. Professor Black (*The Art of History*, p. 2), in accord with Dr. Jameson, suggests "that the important thing" about the historians of the eighteenth century "is the fact that they applied the whole culture of the age in which they lived to what they did know of the past; and this gives their books a substantiality and a depth of insight not uncommonly lacking even in the 'scientific' histories of more recent times."

FRED MORROW FLING

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The Science and Method of Politics. By GEORGE E. G. CATLIN. New York, Alfred A. Knopf, Inc., 1927.—xii, 360 pp. $4.00.

At the present time political science is in a state of flux. Those who have followed the discussions conducted during the past few years under the auspices of the American Political Science Association have had ample testimony as to the amorphous condition of this discipline. Not merely the methods to be followed, but its objectives, even the matters with which it should deal, are subjects of controversy. Such uncertainty did not exist when political scientists by general agreement concerned themselves solely with the state, and limited themselves either to public law, or latterly to the study of the visible organs of government in their operation and the parties which directed them. Now there seems to be a fairly general conviction that in justice to their subject, political scientists should dig deeper, in order to tap the well-springs of political activity, and it is casting about for modes of accomplishing this which has produced the present disagreement both as to scope and methodology. It has also led to a reaction. Many students have been impelled virtually to forsake the traditional lines of investigation and devote themselves to what their more conservative colleagues would consider the legitimate fields of sociology and social psychology. Professor Catlin falls within this category, and his book exemplifies a complete departure from the customary treatment of the subject, which is none the less stimulating on that account.

Probably the majority of political scientists still consider that their field relates essentially to the organs of the state and efforts to control them, and would conduct their investigations outward from this focus. They identify the subject-matter of their inquiry by its relation to a certain type of human association. But Professor

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Catlin cuts loose from traditional affiliations, and claims that politics, on the contrary, deals with a certain type of human activity. He defines it as "the science of the method of social organization." The subject-matter is the *individual* "dominated by the will to stand in relation to other willing beings." He believes that, like economics but unlike history, politics is a science, in that it affords the hope of certain definitive principles, which, when ascertained and applied, will effect the resolution of social conflicts and maladjustments. From this viewpoint, obviously, the state and its problems sink in importance to the level of the myriad other associations in the operation of which phenomena of social control are manifest, and the study of governmental institutions themselves becomes relatively insignificant. Hence it is natural that the writer should have turned to the sociologists and political theorists rather than to the students of government for his inspiration.

History, on the other hand, becomes the great store-house of investigation, and Professor Catlin devotes more than a fourth of his book to its nature and uses. He reviews the poetic, religious, and utilitarian treatments, and concludes that although history itself cannot become a science, it constitutes above all the source of material for the social sciences. But its use must be selective, and that implies a purpose in selection. "For the social scientist the study of History is the study of human method." He claims that we are not dealing with a series of unreduplicable, unpredictable human events, but with certain recurrent behaviour patterns which may be studied and understood, and eventually controlled for the benefit of mankind. Certainly to the social scientist history furnishes an extension of present experience, yet we should add the reservation that as situations become more remote, precedents also are likely to become of more dubious applicability. Psychological factors may remain constant, but there are many other variables in a given social situation.

The fact that many political scientists will refuse to follow Professor Catlin in his relegation of the state and his view of the nature and scope of the subject does not necessarily reflect upon the value of his contribution. He suggests that we probe the history of human conduct in order to discover principles of statesmanship. Doubtless most political scientists, if they will admit it, cherish the hope that principles worthy of general acceptance will yet be formulated and some progress, in the sphere of administration at least, seems already to have been achieved. Possibly, too, social scientists may eventually attain some formulae regarding social control which will be at once

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comprehensive and significant, but this will be through a synthesis of the contribution of history, politics, economics, psychology and ethics. Meanwhile hypotheses, to be of practical applicability, must remain pedestrian and endure patiently the ruthless tyranny of facts. Therein lies the difficulty. There will be some question as to whether the author's programme, however adequate and praiseworthy in its objectives, is not too comprehensive for other than subjective treatment as yet. It will be pointed out that "Social Psychology" has suffered from just such an approach. The danger is over-simplification—that we shall start with some *a priori* hypothesis and attempt to explain social phenomena in terms of the operation of this factor to the neglect of others perhaps equally pertinent. The present reviewer recalls, for instance, a book which sought to explain the phenomena of intransigent national minorities throughout the world solely on the basis of what was called "the oppression psychosis," which may have been quite true, but did not contribute much to the elucidation of the problem.

Although Professor Catlin takes his start from much surer ground than this, it cannot be said that the method he suggests politics should pursue is as convincing as the rest of his discussion, nor does it altogether avoid laying him open to this criticism. He submits that just as economics has proceeded from the assumption of an economic man, motivated by the will to possess, and has derived its content by tracing the operations of this incentive, so politics is entitled to formulate the hypothesis of a political man, characterized by the will to dominate, and should concern itself with the ramifications of this trait through society. Obviously such a thesis invites much skepticism and a host of queries. In proportion as principles become inclusive they become tenuous. Social situations are far too complicated for diagnosis, still less settlement, by the use of any specific abstraction. Participants in the present agrarian controversy in the United States are afflicted with the will to power, but also with the will to possess; so also, no doubt, were the Gracchi and their followers. Perchance more problems of political conflict are solved nowadays by applying the well-tried principle known as "perfuming the ticket" than by a realization that men are impelled by a will to dominate. We cannot differentiate the social sciences on the basis of this or that human trait—to do so is to beg the question and place each in jeopardy of destruction from the explosion of the basic hypothesis. Rather do they exemplify differences of point of view and emphasis in dealing with the social process. We must determine tentatively

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what aspect of that process it is our function to observe, and deduce principles only as tried experience warrants.

What the younger economists will think of the view of their subject here presented may be left to conjecture. What is said of the basis of economics and suggested for that of politics does, however, indicate the relation of these sciences to psychology. The author eschews building political theory upon psychological premises, as these may soon be out of date and prove not merely vain but harmful. But has he not founded politics and economics upon views of human nature? The point is that it is the same human nature in either case, and our knowledge of it must be derived from and should continually be corrected by the contribution of psychology. Again, in his assumption that politics concerns itself with the relationships of *willing* individuals, Professor Catlin evades a major issue in connection with which the aid of psychology should not be ignored. To what extent, in this age of mass propaganda and coercion by occupational associations, is individual volition and action a significant factor in politics? The author disregards Bentley's thesis—which has now attained respectability—that effective political activity is the activity of groups, and hence that the researches of political science should begin here, not in the *arcana* of the human spirit.

Professor Catlin criticizes political science for undue preoccupation with the state and the machinery of government, but he also recognizes that it must work outwards from the nucleus of governmental experience. It is well not to forget the second of these admonitions through zeal to apply the first and achieve by a short-cut some seductive principles of social control. Certainly we have much to learn regarding political processes and the art of governing from associations other than the state. But it is likely that political science for some time to come will have to concern itself mainly with the traditional subject-matter for a very practical reason. There are a multitude of problems within the strictly governmental sphere for which the assistance of systematic studies of limited scope is essential. To fill such a need will fully occupy the time of many investigators, and surely they deserve the title of political scientists even if they do not ride Pegasus. Furthermore, those who have the taste and capacity for synthesis, if their generalizations are to rest upon a firm basis, must build upon the foundation of such studies, and can proceed but a stage at a time. Even the supposed truism that upper chambers are a "check upon hasty and ill-advised legislation" is only beginning to be tested. Finally, it is within the field of gov-

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ernment that our methodology is being developed, whence it will doubtless be applied to other phases of human activity as interest broadens. Certainly there is no reason why studies should not now be undertaken of the technique and mechanisms of control in other associations—churches, labor unions, business organizations, and the like—so that a start may be made in the direction of the goal visualized by the author.

Professor Catlin, then, has made a highly suggestive contribution to political science. He has reminded us, moreover, that the subject has to do with problems of deeper significance, of much wider scope, albeit far more elusive, than the tinkering up of legislative procedure or the devising of restrictions upon the activity of party committees. The only quarrel the present reviewer, at least, has, is with what he understands to be the starting-point proposed by the author.

A. GORDON DEWEY

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Wealth, Virtual Wealth and Debt. By FREDERICK SODDY, New New York, E. P. Dutton and Company, 1926.—320 pp. $3.50.

It is not often that students in one field of human knowledge have the interest, the ability and perhaps the temerity to offer original contributions in other and largely unrelated fields. *Wealth, Virtual Wealth and Debt*, written by one of the most distinguished of living British scientists, a Nobel Laureate in Chemistry, is a serious and sometimes impassioned endeavour to apply certain basic concepts of physics to the complex and shifting phenomena of economic life. It deserves the attention of every student of economics, for there is much that is good in it along with much that is bad; and it challenges certain fundamental economic concepts and practices in ways which cannot be dismissed as merely superficial or merely fanatical.

The basic contradiction which Professor Soddy courageously assails, the conspicuous evidence of failure in the economic system as it exists today, is one which has long been familiar to thoughtful students, even to the economists whom he so bitterly condemns. On the one hand, the progress of science and of industrial technique has been so great that the world's physical capacity for producing physical wealth—commodities of every kind—is now almost unlimited. The extraordinary results achieved by systematized production during the war, under intelligent centralized control, show that the limit on what *can* be produced is far beyond what the non-belligerent in-

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dividualistic money economy now actually *does* produce. On the other hand, the nature and operation of the present money economy are such that, despite this huge *physical capacity* for production, the production now actually secured is wholly inadequate to meet the reasonable needs of the world's population. There is not nearly enough purchasing power, expressed in terms of money, to buy all the commodities which it is physically possible to turn out; large sections of the population cannot get work; and the result is unemployment and poverty. The solution of the paradox Professor Soddy finds in exclusive governmental control of the supply of money. Changes in the supply are to be effected by increasing or decreasing taxes and by selling or buying up government bonds, the need for the change being indicated by the movements of a scientifically constructed index number of prices.

These conclusions Professor Soddy derives from a detailed though not always realistic analysis of the present economic system as a whole. He begins by describing the origin of wealth, taking wealth always to mean physical wealth—commodities or other equipment. Money, on the other hand, is not wealth at all, but what Professor Soddy describes as *virtual* wealth. The possession of "genuine" money (the meaning of the phrase will be made clear in a moment) is the evidence that the possessor of money has *not yet* received the (real) wealth to which he is entitled, and which he can demand of the community at his convenience. It is an evidence, that is, that he is *owed* wealth by the community. The aggregate of the money in the community represents the aggregate value of the wealth which the community prefers to be owed currently rather than to own. This negative quantity of wealth is therefore termed "virtual" wealth. Prices, incidentally, are high or low according as the number of units of money rises or falls; and according as the volume of real wealth, which the community prefers to be owed, falls or rises.

To this point Professor Soddy's discussion is illuminating and useful, and indeed has much in common with the conclusions of certain present-day economists. The same observation applies to his later analysis of the circulation, or flow, of wealth and money. But when he discusses the operation of the banks and the nature of bank credit he is less easy to follow. The essence of his position is the view that the banks as they now exist are perpetrating a gigantic fraud by the creation of bank credit; and that by charging interest for the use of that credit they are mulcting the world of wealth. With the increasing use of the bank check, and the consequent vast multi-

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plication of the "efficiency" of genuine money (gold, silver, or government paper money) the banks have largely ceased to lend genuine money, and instead now lend merely bank money, fictitious money (that is, bank deposits) created for the purpose. What they lend deprives them of nothing they had before; in other words what they lend is precisely nothing, and to charge interest for the loan is robbery. The remedy, he finds, lies in giving the right to issue money exclusively to the government, which will issue it according to the principles outlined above; and in thus depriving the banks of the right to lend anything except governmental money actually in their vaults.

This indictment is dramatic and impressive, but unfortunately it rests on a familiar misunderstanding of the nature of banking and of the actual limits on the volume of lending. If there were but a single bank in the country, and if the country were isolated from all others, the indictment would be in large part valid. And under the banking system as it actually operates it is true that the reserve ratio may fall to or even well below fifteen per cent in a particular bank. But this does not mean that the excess of loans over cash represents the creation of fictitious money. If a bank grants loans in excess of its cash reserves, it is soon faced with checks drawn under these loans, and largely payable to *other* banks. To honor them it must *previously* have acquired assets equal to the full amount of the drafts, whether specie, balances, negotiable paper or securities. A corresponding proportion of these assets is surrendered directly or indirectly when the checks drawn under the loans are presented. In other words the bank, in making a loan, *does* deprive itself almost at once of something of commercial value. No fraud is involved; and the interest charge, unless one denies the justice of charging interest under any circumstances, is warranted. Professor Soddy's confusion arises from his failure to take account of any of the assets of the banks *except* specie. It is an ancient confusion, which crops up from time to time in the annals of economics, but its age does not make it less regrettable.

Yet in spite of the fatal defects in parts of the argument, other parts of Professor Soddy's discussion and criticism are suggestive and valuable. Some of them, especially the analyses of wealth and virtual wealth, have already been referred to. Equally interesting and useful are the discussions of the absence of any definite relation between the time spent in producing capital goods and the continuous expenditure necessary to make these goods themselves productive;

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of the relations between interest and real abstinence; of abstinence itself as the essential to increased production, and of the necessary parallel increase in the quantity of money; of the theory of money and prices; and finally parts of the objective program for monetary reform. It is a difficult book to read, but a provocative one. We may hope that Professor Soddy will see fit to produce another before long, in which the argument is clearer and more closely knit, and in which the more serious errors of fact are omitted.

JAMES W. ANGELL

The Philippines, a Treasure and a Problem. By NICHOLAS ROOSEVELT. New York, J. H. Sears and Company, 1926.—xii, 315 pp. $3.50.

This volume is not an armchair product. The author provides no bibliography, cites no authority, and barely refers in the preface to his reading on the subject. Extensive first-hand investigations by an experienced and unprejudiced observer give the work its value. Official sources are properly relied upon for some quotations and more statistics. Otherwise the pages contain little but a record of Mr. Roosevelt's observations and of his reactions thereto. He has not approached his problem with preconceived theories to prove or doctrines to preach; neither has he an economic or political interest to promote.

In the narrow compass of 65,000 words, it is obviously impossible to treat adequately all aspects of the Philippine problem. Though such topics as religion, law, justice, local administration, and taxation are omitted, the book should be criticized on the basis of the topics selected for consideration. Deliberate omission of a systematic presentation of historical developments in the Islands, likewise, does not imply ignorance of the data. The topics selected for special treatment are communications, agriculture, education, and health. In dealing with these, Mr. Roosevelt displays real acumen and shows that he possesses the necessary general information about other aspects of Philippine affairs to assure the validity of his conclusions.

The problem of the Philippines is not one to be considered with exclusive reference to the islands and their peoples. The experience of neighboring lands and similar peoples should be carefully scanned to provide a comparative standard for gauging Filipino conditions. Mr. Roosevelt's personal study of Dutch rule in Java

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has enriched his pages with illuminating criticisms and suggestions. His constructive proposal of a commission of experts, not of politicians, to study the Dutch, French, British and other neighboring colonies and protectorates deserves adoption.

The United States cannot act in the Philippines as if the islands existed in a vacuum. Their administration is bound to be affected by the way their neighbors are handled or act. American proceedings in the islands necessarily react on all Malaysia and even on more remote regions. The grant of Philippine independence, Mr. Roosevelt insists, can only be safely considered after carefully weighing all elements, including the interests and obligations of the United States, in the complex and rapidly changing Far Eastern situation.

Unfortunately, American policy toward the Philippines has been, from the outset, a matter of partisan politics in the United States, though the avowed determination of the government has been to assure the Filipinos a type of administration that experts and not politicians can provide. American achievement in the archipelago has been the work of such experts as were available or were developed at the task; American failures and blunders in the islands must be set to the account of the politicians. The plea, so often voiced by both Americans and Filipinos in the islands, for a definitive announcement of American policy, especially upon the question of independence, is really a demand to take the Philippine question out of politics, for a policy once announced would have to be adhered to by successive administrations in the United States regardless of party. The United States should administer the Philippines for the welfare of all the people in the islands. It alone, Mr. Roosevelt insists, has the right, the power, and the responsibility for determining what it shall do and how long it will be necessary to do it. Two more generations, he believes, will be necessary to bring the Filipino peoples as a whole to fitness for self-government.

Basic to all other progress in the islands is their economic development. Evidence is presented to show that the natives lack the initiative, the ability, and the capital to prosecute this undertaking. It must be achieved by outsiders with foreign capital. All the logic of the situation points to Americans and American capital as the agents and instrument best suited to the task. Existing legislation should, therefore, be speedily amended to facilitate the enterprise. So far the reviewer finds himself in full accord with Mr. Roosevelt, but he confesses his inability to accept the author's declaration (p. 281) that "there neither is nor ever has been any desire to 'exploit'

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the Philippines". It will not be an easy task to provide the necessary safeguards for the rights and welfare of the Filipino peoples from encroachment by those to whom interest coupons and dividend checks are primary considerations. It is sadly true that such folk exist among the citizens of the United States as well as of other countries. The ideal solution would be, as is hinted on page 143, economic partnership of the Filipino and American peoples.

Assuming that the Jones Act must remain the fundamental law of the islands, Mr. Roosevelt suggests several specific amendments to secure somewhat larger powers and greatly increased efficiency for the American section of the insular administrative system. Separate administration for the Moros and other non-Christian peoples and unification in a single bureau of the control of all overseas possessions of the United States is advocated. These suggestions, though not altogether novel nor beyond debate, are shrewdly combined into one of the most practicable constructive proposals yet presented.

The critical observations of Mr. Roosevelt with reference to both Americans and Filipinos are always frank, sometimes severe, usually just. The Wilson-Harrison administration is vigorously criticized and the work of General Wood approved. The Filipino peoples are treated with sympathy and discriminating criticism. For the Filipino 'politicos', the author finds no good word to say, and declares (p. 281) that they "have singularly failed to give that share of cooperation which is their part of the bargain." Readers unfamiliar with the facts may derive a less favorable impression of the achievements both of the American government and of the Filipino peoples under American rule than the facts warrant. This result, however, is almost unavoidable in an effort to disabuse the American people of the unduly rosy views that have been presented too generally in recent years.

The American public sadly needs education in the facts relevant to the problem with which their government is dealing in the islands and in the significance of the archipelago with reference to the Far Eastern question in general and the relation of the United States thereto in particular. To these ends Mr. Roosevelt has made a laudable contribution.

GEORGE MATTHEW DUTCHER

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Loyalism in Virginia. Chapters in the Economic History of the Revolution. By ISAAC SAMUEL HARRELL. Durham, Duke University Press, 1926.—ix, 203 pp. $2.50.

This little volume is an interesting and significant study in economic determinism, straightforward, scholarly, and to the point. It does not make the mistake of claiming that party division and sentiment were based entirely on how much or how little each Virginian had and on what the effect of the Revolution would be on those possessions. Political disputation was as dear to a Virginian as to any other colonial, and principles of government aroused as much heat as elsewhere; social factors were also not without weight; but the late Professor Harrell chose here to investigate and evaluate economic conditions, little studied heretofore. He has made skillful use of much governmental material in Richmond which has lain unused by investigators—notably the patent books and the auditors' books. He has also used most of the more evident sources, printed and manuscript, primary and secondary. The book includes a bibliography and a workable index.

Virginia planters have often been considered as having been as near like the English landed aristocracy as any in America, and, therefore, it would seem that they should have been strongly attached to the mother country. But their sympathy in the Revolutionary struggle was almost entirely on the side of the Patriots. Professor Harrell looks for the cause of this unexpected development and finds the solution in the economic situation. His conclusions lead to the belief that the plane of their patriotism was on a much lower level than Fourth of July orators have been accustomed to admit, and with rare restraint in this age, he does not work the point much beyond the mere recital of bare facts. Prosperity had by the opening of the Revolution largely deserted the old Virginia plantations. Wasteful methods of agriculture had already leached the fertility from much of the land and had set the planter on the look-out for new regions. He turned his eyes westward and was just beginning to lay gigantic plans for securing possession of the Trans-Alleghany country both for legitimate agriculture and for speculation when a new policy was instituted by Great Britain in the Proclamation Line of 1764 and in the Quebec Act. The rulers of Virginia here found their plans directly thwarted and it was only natural that they should resent it, especially when plans were soon on foot to grant these lands to certain Englishmen and speculators in colonies farther north.

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This situation set their sympathies toward the Revolution; but there were yet other gains to be had. Year after year the planters had sent their orders to England for supplies of all sorts and had exported in payment whatever there was to send, but the gap between what was owed and what was paid had long had a tendency to grow wider rather than to close up. So what would be a better way to satisfy old troublesome debts to British merchants than to break with the mother country and to declare the debts void? Jefferson and other prominent Virginians at the beginning of the Revolution significantly enough owed big debts to British merchants.

Virginian agrarianism was for the war because it believed the war was to its economic advantage; Virginian commercialism was loyal for the same selfish reason. In earlier times merchants and shippers might have objected to navigation laws, but by 1775 they had come to see that their greatest good lay within the protection of the British dominions with its widespread opportunities rather than on the edge of a new country struggling for existence with its commercial position among the nations of the earth yet to be secured. So the merchants in Virginia were loyalists for the most part. Soon civil war broke out around Norfolk and in other centers of commercialism, and as the Revolution got under way Virginia became more insistent and harsh in her dealings with loyalists. Many of them were driven out of the country and their property was confiscated. The debts of Virginians to British merchants were sequestered, and any hard-pressed planter who cared to could carry his money to Richmond and satisfy the debt by handing it over to the government, which in turn would use it in furthering the Revolution to make the settlement final. The easy device of printing paper money was resorted to and soon the money became practically worthless. With this cheap medium the planters paid their debts.

The war came to an end, the Treaty of Independence was signed; yet Virginia's troubles were not ended. The commercial North won the victory around the peace table while the agricultural South remained unrepresented. Supported by the treaty, British merchants hurried to put in their claims for their debts long overdue. Led by Patrick Henry and others, the planters resisted the payment of these claims and threw every impediment possible in the way of loyalists or British merchants collecting debts or recovering property. While the Confederation lasted Virginia successfully maintained her position, and the strong hostility of Patrick Henry, George Mason, and others to the Constitution was largely actuated by the fear that

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the courts se up under the new government would force the collection of British debts. These fears were realized. Virginia planters forced to pay their long-standing debts to the British merchants ere greatly inconvenienced—some borrowed money from France w me sold out their holdings and moved out into Kentucky. and so bitter toward the Federalists who had brought about this All fel rs. Naturally they turned to the Republican cause. state of affa arrell has told this story well and in a convincing Professor J fashion.

E. M. COULTER

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The Racial asis of Civilization, A Critique of the Nordic Doctrine. By FRANK H. HANKINS. New York and London, Alfred A opf, Inc., 1926.—x, 384 pp. $3.75.

In the eteenth century the racial interpretation was used to explain evey thing from the English Parliament to the Reformation. More recer race has been allowed to explain nothing; some would even dives the term of all meaning. Professor Hankins takes a middle gr , arguing that race is certainly one factor in social evolution a ing his argument on modern investigation. rt of his book is devoted to an interesting study of

The gre especially the Nordic Doctrine. It is much easier previous theories octrines than to clarify them, but the attempt to to ridicule these ls the frightful inconsistencies of the racialists, do the latter rev father, Gobineau—inconsistencies that did not, especially of the with the effective preaching of the racialist gos- however, will o believe," overcame all obstacles of the intellect. pel. Th for example, "saw a vast amount of careful scholarly German sing the absurdities of Teuton worship" at a time when work ex of race flourished most vigorously.

the religionor's own concept of race is a complex idea, far removed from the naïve assumptions of the last century. It includes three primary factors: (1) "the idea of distinctive hereditary traits"; (2) the idea of variability among the members of the racial group; (3) the idea of overlapping among races, when only single traits are measured, necessitating the combination of a number of traits to distinguish one race from another. This complex idea is not, however, impossible of clarification.

The primary difficulty is the difficulty of thinking in terms of relatives

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> rather than absolutes, of probabilities rather than certainties . . . the actual world is a world of variability, constant alteration, and relativity. We shall find that racial types are themselves in a state of flux and that the differences between types are relative rather than absolute . . . variations of certain fundamental attributes which belong to all mankind.

A race thus becomes a group of people possessing a cluster of physical traits, "each more or less variable, all inherited as an ensemble within their limits of variation, and sufficiently distinctive when taken together to mark off their possessors from other members of the human species." There are no pure races, of historical importance at least, because any race with sufficient culture to conquer must have been in contact with other groups, migrate and become mixed. Historical groups like the Slavs, Celts and Teutons therefore are political and ethnological rather than anthropological. Race mixture may be good or bad, depending upon the qualities of the strains crossed.

This does not mean, says the author, that all races are equal. Here again the idea of the type and variation from the type is important. Racial inferiority and superiority are real, but relative rather than absolute matters.

> When two groups are measured as regards any trait they are almost certain to overlap, because all members are human. It is conceivable that they might even overlap throughout the whole range but show different proportions in the statistical distribution of variation, differences must be those of quantity and hence that group which shows the greater average or the greater frequencies in the upper ranges of the variations must be looked upon as the superior, *with reference to the particular quality in question.* The same group may be inferior with respect to some other quality. On this basis it is perfectly logical to speak of superior and inferior races, but the trait or quality to which the superiority applies should be indicated.

The averages of the two races may be relatively close, but it is the "relative proportions of the two groups in the upper ranges of abilities and the relative maxima attained by their highest specimens which are of importance." Statistical study has tended to indicate that some races are more fecund in men of genius than are others, just as within the white race the Edwards have made numerous contributions to culture while the Jukes have not, although the difference between any individual Edwards and Juke might be insignificant.

Professor Hankins does not claim to be able to show the particular

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influence of specific races in history, though he indicates a general acceptance of Dixon's notion that a Caspian-Mediterranean or Caspian-Nordic combination is probably superior. But he thinks that this question is insoluble at the present time. Indeed, the whole argument of this book is conservatively handled, without dogmatic assumptions and with a wealth of statistical and logical support. It is far removed from the Gobineau-Chamberlain-Grant type of thing in its aims and methods. It does not ignore the tremendous complexity of the processes of history, but makes a reasoned plea for the consideration of one factor often neglected in present-day sociological thinking. There sometimes appears to be a lack of definiteness of illustration (as in the chapter on the political significance of race), but this is probably due more to the difficulty of the subject than to any fault of the author.

T. P. PEARDON

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Ireland. By STEPHEN GWYNN. New York, Charles Scribner's Sons, 1925.—252 pp. $3.00.

Dr. H. A. L. Fisher has found time, in spite of considerable activity in Parliament and even in the Cabinet, to plan and direct a series of volumes closely bound with his work as a professional historian. This series, under the title *The Modern World*, aims, in the words of the editor's preface, to enable the readers of each of its volumes "to understand a nation not as it was a hundred years ago, or even as it was twenty years ago, but as it is now with all the modifying experiences and happenings of the war become part of its system". The past enters into consideration only insofar as is necessary for an appraisal of the present influence of those "fragments of ancient experiences which . . . shape the actions of living men".

Stephen Gwynn was obliged to take account of a good many more of those "fragments of ancient experiences" than the authors of some other volumes of the series. He approached his problem in a rather interesting way, presenting first an illuminating discussion of the spirit of what he calls the "Irish Nation," while his second chapter is devoted to the "Irish People." In this chapter, and throughout the book, the author strives to be more than fair, to be generous, in interpreting the points of view of others whose outlook on life is different from his own. He not only understands the people among

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whom he has lived a good many years of his life but he makes every effort to do them justice. This attitude characterizes his discussion of the educational, social and cultural developments, and even when he handles the controversial aspects of the Irish language movement he is sympathetic and anxious to emphasize advantages rather than disadvantages.

The author is clearly much more interested in cultural and social problems than in those of economics; this is said, however, on the assumption that the plan of the series contemplated giving to the respective authors a free hand in organizing their volumes. A good deal of Captain Gwynn's discussion of industry and labor takes the form of a conscientious recital of the conclusions of secondary works; this is true even in his review of agriculture, the economic activity with which, apparently, he is personally most familiar, so far as Ireland is concerned.

The treatment of the political problems of Ireland as they stood in 1925 is, on the whole, acceptable. In the first and last chapters there are a good many phrases which indicate a sort of resignation with the outcome of the "series of events" which resulted in the creation of the Irish Free State. The author has resolutely made up his mind to make the best of the situation, the antecedents of which it would serve no useful purpose—at least in connection with the volume he was writing—to analyze and judge. In two or three places there is a departure from the studied objectivity which Captain Gwynn sought to cultivate in handling the delicate questions of right and wrong in connection with the revolution against England and the internal disturbances in the late winter of 1921-22. It is regrettable, for example, that he should not have refrained from even the qualified approval of the military executions by the Free State Government in 1922, which is implied in this language (p. 205): "There was no trial and the proceedings were of doubtful legality, as all four prisoners had been captured before the issue of the military decree which made it an offense punishable by death to be taken in the unauthorized possession of arms. Yet the Dáil endorsed the action, which was later to some extent justified by the fact that no further attempt was made to assassinate a deputy". The extraordinary facility with which the Free State Government glided into the position of the British Government fails to arouse his comment, perhaps for the reason that it could not be mentioned without an elaborate discussion of the singular inconsistencies of the newly constituted authorities in adopting precisely the measures they had so

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long reprobated when taken by the British Government—the steadfast refusal to proclaim a state of martial law coupled with the denial of the protection of civil courts to those engaged in armed resistance to the Saorstát. Perhaps a reference to these inconsistencies would have introduced a note of cynicism which Captain Gwynn was resolutely determined to avoid. One of the most interesting conclusions which the reader draws from the book is the author's wholesome distaste for the unfortunate abortion known as the Six County Government. Captain Gwynn is opposed to partition on grounds of high policy as well as because of geographical and economic considerations. In the light of economic and political developments since the manuscript was sent to the printer some two years ago it is of interest to quote his outstanding conclusions in the last chapter:

> . . . yet the Irish Free State exists, it is Irish, and it is free, and it has, with Great Britain's full concurrence, the rank of a nation. Stripped down to its ultimate elements, the problem stands clearly: how to reconcile the ideals, the traditions, and the purposes of two races and blend them into one, so that "Irish" shall be no longer a word of ambiguous meaning, but equally applicable to all citizens of a free and united country, marked out from the rest of the world by its own four seas, a nation bound together by the equal allegiance of all its people. No greater task can tax the resources of statesmanship and the qualities of human character; but it is Ireland's task now. Nothing that is not Irish stands in the way of its accomplishment: and if it cannot be accomplished by Irishmen, no outside power can convert our national aspirations into a reality.

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Pan-Europe. By RICHARD N. COUDENHOVE-KALERGI. New York, Alfred A. Knopf, Inc., 1926.—xix, 215 pp. $2.50.

This book was written in 1923 while budgets were unbalanced, currencies tottering, the Ruhr and Corfu occupied. Count Kalergi, an Austrian, in the spirit of Oswald Spengler, whom he quotes, saw Europe moribund, and attributed it to disunion. "It forfeited its world hegemony", he writes, "because its peoples were disunited: it will forfeit its independence and what remains of its former prosperity if this disunion continues" (p. 8). The "ecumenical" league of nations started by President Wilson he thought too broad and too thin to meet the situation. What was needed was a United

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States of Europe, equipped with a security pact, an edict of national toleration and an economic union.

The constitution of this "Pan-Europe" is not developed in detail in the present book; in fact the writer warns against premature efforts in that direction. Europeans must be committed to the idea before an opportunity is given them to divide on details. When, however, we find that Pan-Europe is sometimes compared to the United States of America, sometimes to the Pan-American Union, and sometimes to the League of Nations narrowed to Europe, we wonder whether people committed to so vague an idea are really committed to anything at all. In an additional chapter written in 1925, the author hails the regional grouping of nations within the League affected at Locarno as the beginning of Pan-Europe.

His enthusiasm for Pan-Americanism will hardly be convincing to Americans, either North or South. We are informed of the practical successes of this movement at the five conferences since 1890, in settling the dispute between the United States and Mexico in 1914 and in pacifying central America, to which are added its influence in forming "'a Pan-American consciousness, a Pan-American sense of solidarity, and a Pan-American public opinion" (p. 80). One would suggest that the author supplement the information he has gained from Alfred H. Fried's *Pan-America* by a dose of F. Garcia Calderon, Manuel Ugarte or Samuel Guy Inman.

Count Kalergi's account of the process by which Pan-Europe is to be attained is no less vague than his description of the constitution aimed at. Writing in 1923 he says, "If world organization is to take the place of world anarchy, then the first step must be for the states to form themselves into super-states. Just as the successive unifications of Germany, Italy and Poland were necessary stages on the road to a united Europe, so the unification of Europe will be a necessary stage on the road to a united humanity" (p. 94). But in 1925 his organization addressed a memorandum to the Secretary General of the League of Nations suggesting that the League of Nations "at once" apply the Pan-European program by "the Creation of Continental Sections on the basis of article XXI of the Constitution of the League of Nations; first, a British, a European, and an American section" (p. 208). At first he seems to have thought of junking the League, at least as a world organization, and organizing imperial groups, perhaps vaguely united by future Washington Conferences, but after Locarno his mind ran to the wholly different program of decentralizing the League. An organization of

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regions without a world League raises the question, why should a balance of power among continental unions be more peaceful than among nations? Groupings within the League are doubtless not without danger, as President Wilson foresaw, but such groupings might be prevented from becoming dangerous by allowing them to differ for different purposes. Security and disarmament groupings might differ from economic groupings and those from cultural groupings and electoral groupings. The difficulty as well as danger of making single groupings applicable to all purposes can be seen from a survey of the map presented in this volume. Count Kalergi divides the world into five areas. Pan-Europe includes 26 states of continental Europe west of Russia and their colonies, mostly in West Africa. Pan-America includes the American continents and the Philippines but not Canada or the European West Indies. The British Empire, with its political center at London and its geographical center in the Indian ocean, forms a third group, the Union of Soviet Republics a fourth, and Japan and China a fifth.

This conception, which, as the author notes, follows neither geographic nor cultural lines, may have been suggested by the Washington Conference, where the five groups except Russia were represented by France, United States, Great Britain and Japan, respectively. The artificiality of separating England and Russia from Europe, Canada from America and India from Asia must be obvious. The United States has more affiliations with England than with Latin-America. Today the economic life of nations transcends even continental areas. It is doubtful whether any of Count Kalergi's five world federations, even though most of them include both temperate and tropical regions, would be wholly self-sufficing economically. Furthermore, for the preservation of peace the value of the advice of states whose geographical distance assures their impartiality has been repeatedly demonstrated at Geneva.

The book, however, is suggestive. Europe must lower its tariffs. It must also evolve a Monroe Doctrine so that necessary political agreements cannot be wrecked by outside veto, as by Brazil in March, 1926. A European spirit must be established. The overemphasis, the enthusiasm, the varied appeals to cultural prestige, defense against Bolshevism and economic expediency in this book have had a considerable effect. There is a Pan-European Union. It held a conference at Vienna in 1926. Its phrases were on the lips of Briand and Stresemann at Geneva in September, 1926. We need not expect that European nations will disappear, nor that the world will

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organize itself according to the picture here presented, in order to recommend the book to all interested in world politics. It is full of wise aphorisms and a spirit of political experimentation sorely needed.

QUINCY WRIGHT

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Practice of Municipal Administration. By LENT D. UPSON. New York, The Century Company, 1926.—xii, 588 pp. $4.00.

The purpose of this book is to give a comprehensive survey of the practice of municipal administration in the United States, and to suggest such improvements as can be drawn from our vast experience in an important field of human endeavor. America, during the past three decades, has been serving as the world's most active laboratory in municipal science. The number of civic activities has increased so rapidly during this interval, and they are so varied in character, that no one can now hope to present a detailed study of them all without running far beyond the limits of a single volume. Dr. Upson fully appreciates all this, and he has not sought to achieve the impossible. His aim has been to provide, for the intelligent layman and for the somewhat less intelligent college undergraduate, an opportunity to acquire an acquaintance with municipal administration as a whole, to realize what the broader problems are, and to get some conception of the difficulties involved. One of the great American delusions of today is the widespread conviction that any able-bodied citizen, whatever his competence or lack of it, can master the intricacies of a municipal department in the few months that immediately follow his election or appointment to the headship thereof. That popular obsession has been costly beyond all reckoning. No one can read this book without having that fact driven deep into his mind.

Compared with other books in this field, Dr. Upson's book covers a wider range. It includes chapters on motor transportation, traffic regulation, centralized purchasing, the city's law department, markets, and other topics which have not hitherto been given separate consideration in college text-books, or in volumes designed for the enlightenment of that phantom fellow, the general reader. This disintegration of the field suggests the query why the city clerk's office is not honored with a chapter. Or the boss! Surely the Murphys, Olvanys, Maschkes, Vares, Parrots, and Lomasneys have

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not been negligible factors in municipal administration during the past three decades.

There are thirty-one chapters in the book. The first deals with administrative organization; the other thirty take up the administrative functions one by one. These chapters vary somewhat in length, and hence in the relative amount of detail which they compress into their pages; but most of them balance up rather evenly, thus giving the implication that all municipal departments are created free and equal, which of course they are not. On the other hand one might cavil at the allocation of nineteen pages to the gathering of rubbish and garbage, while only eighteen pages are assigned to the subject of city planning in all its phases. The city schools absorb from one-fourth to one-third of the tax levy in the average municipality; but education is surveyed in thirteen pages while the civil service gets twenty-three. Every author, in writing a book on so diversified a theme as this, is under an inevitable temptation to let the intensity of his own personal interest be the determinant of relative importance. Perhaps Dr. Upson has been subject to this human frailty in no greater degree than others who have preceded him.

One of the strong features of the book is its "practical" character. This is in keeping with the drift of the day. There is very little generalizing. Every chapter bristles with facts, examples, illustrations, definite data, and paragraphs that give evidence of compression with a trip-hammer. As director of one of the most efficient research bureaus in the country, the author has seen municipal administration through a microscope. His acquaintance with all phases of it is intimate, as is amply attested by the range and character of the materials cited in the footnotes. They cut a wide swath through the whole literature of the subject and have been chosen with much discrimination. No one can question Dr. Upson's thorough knowledge of the Amercian city as a going concern.

But, strange as it may sound, a general survey can easily be made too practical, too concrete. Too much realistic detail tends to make even the best panorama dull. A picture that is all color, with no design or very little, leaves no sharp or lasting impression. Unless the facts are hitched to principles, therefore, a good deal of their significance is apt to be lost upon the reader—and the two are by no means so securely wedded in this volume as they might be. To the crass layman some of the author's paragraphs will hardly mean much. Take this one (p. 439) for example:

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> Standards as to both physical and chemical qualities have been established and should govern the use of bituminous material in the construction of pavements. These qualities are measured by numerous tests, including the penetration test, the float test, the viscosity test, test for water, test for loss on heating, distillation test, flash test, test for soluble bitumen, and test for specific gravity.

It goes without saying that encyclopedic condensation of this type makes tough sledding for college undergraduates—which may not be a bad thing for their flabby souls. Their absorbent capacity, as any experienced teacher can attest, is about one idea per page, and Dr. Upson's batting average runs way above that figure. Indeed, it is reassuring to see such confidence in the intellectual receptivity of our fellow citizens, whether old or young. And it is even more comforting, in these accelerated days, to find an author who does not gloss the difficulties of his subject by resort to platitudes and exhortations. An honest volume, written with serious purpose, and marked by good workmanship, this book deserves the considerable vogue that it will undoubtedly obtain.

WILLIAM B. MUNRO

HARVARD UNIVERSITY

Disarmament. By P. J. NOEL BAKER. New York, Harcourt, Brace and Company, 1926.—352 pp. $4.00.

It has aptly been said that "armaments are a very complex organic compound of politics, ethics, geography, economics and nearly everything else, including mathematics." Professor Baker, while paying his respects to the difficulties involved, would resolve the problem into one largely of mathematics. If this assessment of the problem be correct, doubtless he is justified in believing that a satisfactory disarmament treaty may be hoped for within a generation. "What two generations have created," he says, "one generation surely should be able to undo."

Even so, the difficulty involved in an isolated frontal attack on the stronghold of armaments, fortified as it now is by all the intangible, and therefore doubly powerful, forces of alleged national requirements, is recognized by the author, and he takes pains to assure us that "the problem of *security* is now universally agreed to be a part of the problem of disarmament." The League, he says, must carry through a "scheme for general security" before disarmament can be achieved. This "chief and indispensable

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condition" may therefore hearten our efforts, and suggest a flanking tactic by which our objective may the sooner be gained.

Professor Baker's preoccupation in this book is not with security — though he is unconsciously influenced by the anticipated mollifying effects of security to think in terms of benevolent national attitudes yet undeveloped. He is concerned rather with working out the basis of a disarmament treaty. Nor does he balk at the difficulty of "conditions of success." The treaty, to be effective, must be "general", in the sense of being a single comprehensive convention, adhered to by the generality of nations concerned, and including all branches of armaments—land, naval and air. Furthermore, it must be achieved through the instrumentality of the League of Nations, which will be indispensable in the implementing of "controls".

The assessment and comparison of armaments, Professor Baker tells us, is entirely practicable. His proposals do not lack boldness. The Versailles Treaty system of armaments, as imposed on Germany, should, on grounds of "equality of treatment," be applied generally. It is recognized, however, that such a scheme would not find general acceptance. Substitutes are accordingly offered. As to air armaments, the final means of reducing the danger arising from the probable use in war of peace-time commercial air forces lies in "the systematic organization of joint international defence against sudden aggression by air attack"—which is admittedly a confession of failure to achieve effective limitation. (France's recent experiments with bombing craft would seem to suggest doubt as to the supposed repugnance to that form of warfare.) The problem in connection with chemical warfare presented by the existence of a large private organic chemical industry is to be solved by the distribution of this industry among different countries, to prevent too great concentration in any one country, and to facilitate control by means of an international directorate linked with the League. The problem of naval disarmament, in the light of the partially successful Washington Conference, is seen to be "essentially simpler than disarmament on land or in the air." It is simply a "matter of government good will." How simple it is, when it comes to limitation of instruments that are not only of unquestioned value as a means of defense but are also relatively cheap, we have recently been able to judge. We are told that submarines must be abolished.

There remains the problem of fixing the ratios of military strength between the various countries. This, we are told, is "essentially

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a political question," and, although it is said to be "the crux of the disarmament problem," only one chapter is devoted to it. The psychological value of a "formula" on the basis of which to fix a ratio, is recognized. The discovery of such an aid is, however, not so easy. After passing in review various principles—size of population, military "*potentiel*," etc.—Professor Baker concludes that the *status quo* of 1913 would offer the best basis on which to work. Assuming, however, that agreement on this basis could be reached, which is highly dubious, the problem would not be solved. There would still remain certain "other factors," such as "vulnerability of frontiers," "economic resources," etc., which would qualify the application of the formula. The adjustment between the "formula" and the "other factors" would have to be made "empirically," that is, as the result of a "prolonged and probably a difficult negotiation." One can be certain as to its difficulty.

Professor Baker assumes, however, that the pathway of the negotiations will be smoothed by the fact that the states approaching the problem of disarmament are going to be "in earnest," by which he means that the basis of state policy will no longer be "power and prestige," but will rather be the "League of Nations viewpoint"—the maintenance of national and international peace. "Many governments," he assures us, "have now begun to regard the Covenant of the League of Nations as the basis of their foreign policy," and he sees opinion moving "reasonably fast towards these League conceptions." At this point, however, we seem to be invoking the solvent powers of an altered international psychology which we may hope for at some time, but which is not yet on the horizon.

In spite of these and other difficulties, the book is a valuable contribution to the literature of disarmament. It is comprehensive in scope, and represents an honest attempt to get down to practical workable solutions. It will not, however, regale the layman. Even the chapter on "Reasons for Disarmament" does not arouse one's emotions, the reasons being categorized in cold numerical order. Though the book would be more useful with an idex, there is a good analytical table of contents.

G. BERNARD NOBLE

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Individual Liberty. Selections from the writings of BENJAMIN R. TUCKER. Edited by C. L. S.—New York, Vanguard Press, 1926.—x, 294 pp. $0.50.

The literature of individualist anarchism is not comparatively abundant, and what there is proves difficult to obtain. Few subjects, moreover, provoke so regularly and in such quantity a mass of nonsensical and ignorant talk and writing. Hence the Vanguard Press is to be commended for adding to its series, as representative of the individualist anarchist view, *Individual Liberty*, by Benjamin R. Tucker—representative, and in a degree authoritative, for Mr. Tucker more than anyone else is able, through a long association with the anarchist movement, personal acquaintance with some of its earliest exponents, and thorough knowledge of the strongholds and difficulties of the anarchist position, to clarify some of the more knotty issues. And he writes with authority, not as the scribes and conservative terrorists.

Individual Liberty is a compilation from the pages of Mr. Tucker's journal *Liberty*, published irregularly, first in Boston and later in New York, between 1881 and 1908, and from *Instead of a Book*, out of print since 1908, and itself a compilation from the pages of *Liberty* during its first dozen years. The larger part of the volume consists of direct criticism of the statements of other writers on economic and political subjects, many of them published as communications to the editor of *Liberty* (here skillfully condensed into a sentence or so by C. L. S., for many years an associate and employee of Mr. Tucker's). The result is an anthology, well selected and arranged, of Mr. Tucker's pronunciamentos. The consequence of the method is that, aside from Mr. Tucker's best-known piece of writing, an essay called "State Socialism and Anarchism: How far they agree and wherein they differ," the passages have inevitably a fragmentary effect, and, though ample for the immediate point at issue, fail to develop connectedly and with any completeness the author's opinions on the major topics with which he is concerned: money and interest, land and rent, trade and industry, the individual, society, and the state.

The passages do, however, allow scope for Mr. Tucker's shrewd and keen mastery of the art of verbal fencing, his useful elucidation of some of the ideas of Proudhon and Greene, and his clear and pointed distinctions between the essentials and the non-essentials of anarchism. He recognizes, for instance, the power of passive

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resistance, but refuses to condemn the "application of force to invasive men" as incompatible with true anarchism. The truth is that there has been—can be, perhaps—no orthodoxy in anarchism. Except for united opposition to authority, especially the authority of the state, the beliefs and points of emphasis of anarchists are widely diverse; there are, it might almost be said, as many sects of anarchism as there are individual anarchists. Mr. Tucker's interpretation of the ideas of Proudhon, indeed, has not gone unchallenged. Nevertheless, though denouncing the "dogmatic, know-it-all style," he writes of the "grave heresies" of others calling themselves anarchists. His own chief interest seems to be "mutual banking" and "the monetization of all marketable wealth," and he is much more concerned with the abolition of interest, which he believes would inevitably follow the removal of all governmental restrictions on banking, than with the abolition of rent.

He does not, however, ignore the latter, and some of his best pages are concerned with it. The economic argument is probably the strongest that can be brought against individualist anarchism, and it is well that it is the economic argument which is here most fully presented. It might be wished that Mr. Tucker had discussed more thoroughly the objections to his system based on the inescapable inequalities due to economic rent. These inequalities he does not deny; he admits them, in fact, and, after tentatively suggesting certain possible—not probable—palliations, in a page of admirable writing he courageously states his preference for liberty over an incompatible and insipid equality. This position indicates sufficiently Mr. Tucker's attitude to the difficulties raised against him by Mr. Bernard Shaw in the widely known essay on "The Impossibilities of Anarchism."

Other objections to his system Mr. Tucker believes would be invalidated by the organization of "voluntary associations," and though the good results of such associations may seem too purely hypothetical to be completely convincing, Mr. Tucker's writings are by no means to be dismissed as the irresponsible dreams of a Utopian visionary. Nor is he a writer of the hortatory sort; his reliance is on argument rather than on rhetoric of the meretricious kind. In short, *Individual Liberty* is to be commended to those who suppose individualist anarchism to have its head in the clouds and no leg to stand on.

RAYMOND A. PRESTON.

NEW YORK CITY

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BOOK NOTES

Professor Chinard has rendered a valuable service to students of the greatest of American political philosophers through the publication, with an illuminating introduction, of *The Commonplace Book of Jefferson* (Baltimore, Johns Hopkins Press, and Paris, Les Presses Universitaires, 1926; 403 pp. $4.00), which has long lain neglected among the Jefferson papers in the Congressional Library. For more than a century there has been much controversy concerning the inspiration of Jefferson's philosophy. During his life his enemies insisted, stupidly enough, that he had made himself a mere American sounding-board for the philosophers of the French Revolution; and this absurd notion has been too generally accepted by a school of historians. In the notations here published for the first time, we see the early trend of his mind or his philosophy in the making; and while there are quotations from Voltaire, there is no indication that he made any impression on Jefferson. "As far as the evidence at hand permits us to draw conclusions," says Professor Chinard, "it may be said that the most famous writer of the eighteenth century had little influence upon Jefferson." Rousseau does not appear in the notes at all, but Lord Kames, who thoroughly developed the theory of natural rights, seems to have made a profound impression. And, says M. Chinard, "there was nothing in Rousseau that he could not find expressed in a much more logical and plausible way in Lord Kames." That Montesquieu influenced Jefferson in early life is evident in this *Commonplace Book*, though the latter's enthusiasm for the author of *L'Esprit des Lois* greatly cooled with advancing years. In his quotations from Sir John Dalrymple we see the development of his views on the system of primogeniture and entail; and in his notes from Pelloutier and Stanyan the strengthening of his faith in popular sovereignty. Perhaps the most interesting notations are those from James Wilson's pamphlet, published in 1774, containing expressions similar to those in the preamble of the Declaration. This book is, in a sense, the autobiography of a political mind. Besides demonstrating the absurdity of the popular notion that Jefferson owed anything worth mentioning to the philosophers of the French Revolution, it disproves the theory that he was given to hasty generalizations or was dependent on inspiration; and, to quote Professor Chinard, he "never was a mere theorist, a dreamer

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and a rash experimenter." It is probable that we do not have the origin of Jefferson's philosophy even in these notes, for they may have been written down for the strengthening of a prior faith. From the moment he emerged upon the public stage, at a very early age, his views were fixed. He never deviated from them. He made them the political philosophy of America.—CLAUDE G. BOWERS.

At first glance Dr. D. Leigh Colvin's volume entitled *Prohibition in the United States* (New York, George H. Doran Company, 1926; 678 pp. $5.00) appears to be a scholarly and objective study of the movement which culminated in the ratification of the Eighteenth Amendment, but a more careful reading proves that it belongs with the propaganda of the prohibitionists rather than with the history of social reform. Through its pages, filled with incontrovertible evidence of careful research, there runs the spirited argument of an ardent champion of a cause. The author's zeal is understandable in view of his years of faithful service to the Prohibition Party, a service rewarded in 1920 by his nomination as the party's candidate for vice-president of the United States. After a colorless survey of the early temperance crusade and its transformation into a campaign for prohibitory statutes, Dr. Colvin centers his attention on the activities of the left wing of the anti-liquor forces. He succeeds in giving a voluminous and carefully compiled account of the state and national campaigns in which the Prohibition Party sought to bring the "dry" voters out of the Republican and Democratic ranks into a common political fellowship. What the inquiring reader does not find, however, is a clear statement of the methods, financial and otherwise, which aided the party in its fruitless attempts. The most revealing chapter in the volume is that dealing with the Anti-Saloon League. Here Dr. Colvin is at his best. With considerable emotion he discloses the irreconcilable conflict between the two factions in the prohibition ranks. In his opinion much of the failure of the Prohibition Party in the campaigns after 1892 is to be ascribed to the growth and influence of the League. The opportunistic policies of the latter organization served well the purposes of the old-line politicians anxious to prevent the development of a political party based primarily on opposition to the liquor traffic. As a result of its subservience to the two major parties the League taught that voters might remain in any political affiliation and by selecting "dry candidates" bring about the suppression of the saloon. Upon the crucial question of the use of the ballot the two organizations parted company, and the conflict could not be reconciled by "solemn

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homilies about cooperation" or by "avoiding subjects" over which they differed. Although Dr. Colvin admits that the Anti-Saloon League opportunists persuaded the nation to accept prohibition, he derives slight comfort from the fact. Almost everything that has happened since 1919 demonstrates the soundness of the position of the Prohibition Party and the fallacy of League policies. The Volstead Act is on the statute books, but there is no national political party committed to its enforcement. Local nullification would now be impossible, if the law were administered by national officials elected through affiliation with a national party pledged to the reform. Here, then, lies the explanation of the two campaigns which the Prohibition Party has waged since the ratification of the Eighteenth Amendment. Its task is not finished. Prohibition requires, says Dr. Colvin, "continuity of legislative support, continuous administration and loyal officials to carry it into effect." There is need, in order to win these objectives, of a political revolution to break up the old organizations and realign the voters in harmony "with the real sentiment of the people on the most important issue of the age." The author finds his historical analogy in the political revolution before the Civil War, "when the Whig Party was discarded" because of its failure to take a position on the vital issue of slavery. He sees no reason why prohibition, which was, and continues to be, a "supreme issue", should not result in a similar shifting of party allegiance. With this prophecy in mind he closes his work with a clarion note to his political associates: "The philosophy of the Prohibition Party in relation to prohibition and the American governmental system was, and continues to be, correct, sound and right." One lays this volume aside with the feeling that the author would have performed a greater service to the generations that will come after him, if he had been able to analyze and set forth objectively the motives which have made prohibition for him and his associates the "supreme issue of the age."—JOHN A. KROUT.

Mr. Ralph S. Kuykendall's excellent little textbook, *A History of Hawaii* (New York, The Macmillan Company, 1926; xii, 375 pp. $2.50), was written under the direction of the Historical Commission of the Territory of Hawaii, which was appointed under the laws of 1921 and 1923 to compile and publish a textbook of Hawaiian history. The author was the Executive Secretary of the Commission; he had access to the Archives of Hawaii, the George B. Carter Library, the Library and Collections of the Bernice P. Bishop Museum, the Library of the Hawaiian Historical Society, and im-

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portant documentary material from the archives of the United States, Great Britain and Mexico. The purpose of the volume is "to describe briefly and simply the historical progress by which Hawaii came to be what it is today—an integral part of the United States, an American commonwealth having a unique social and economic background." The topical method has been successfully employed; and each chapter has been made "to center about some person, some event, or some clearly defined line of development, other things being made subordinate to the central theme, in order that the attention of the reader may be fixed upon the outstanding characters, the decisive events, and the controlling movements in the history of Hawaii." The three opening chapters, written by Dr. Herbert E. Gregory of the Department of Geology of Yale University and Director of the Bishop Museum of Polynesian Ethnology and History, contain an excellent popular presentation of the geology, geography and ethnology of the Pacific and its islands. The remainder of the volume, embracing thirty chapters, tells the story of Hawaii from its discovery by Captain Cook, through the conquest of the islands by Kamehameha, the development of the fur, sandalwood and whaling trades, the progress of civilization and political organization under the native rulers, the elected kingship and the creation of a Republic, down to the acquisition of Hawaii by the United States and the establishment of its present economic and commercial status. The appendices contain lists of the rulers and governors of Hawaii, tables showing the growth of its population and commerce, and an outline of the Hawaiian government. A series of questions and exercises, prepared by Miss Thelma K. Murphy of the Kauluwela School of Honolulu, has been added at the end of each chapter, which will be very useful to teachers of Hawaiian history. For their benefit also, and as an aid to the general reader, a short list of the most important general works dealing with Hawaiian history and a guide to the pronunciation of Hawaiian and Pacific Island words, have been added. In addition, the volume is well provided with excellent maps of the Pacific Ocean, the Hawaiian Islands and Archipelago, and with numerous historical, geographical and commercial illustrations. The book is written in an interesting straight-forward style, and the authors are to be congratulated on having produced an admirable textbook entirely free from prejudice and from arguments concerning controversial historical data. The general reader who wishes to be well informed concerning the character and history of the Hawaiian Islands will find this volume as useful and readable as will the

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student of history. And, although it is evidently intended for the use of the youth of Hawaii and the United States, mature students and readers may profit equally by its perusal. — NORMAN DWIGHT HARRIS.

With a foreword by an eminent philosopher and the blessing of Senator Borah, Charles Clayton Morrison, the editor of the *Christian Century*, has enveloped a worthy subject in a fabric whose warp is ignorance, and whose woof is error—*The Outlawry of War,* with a Foreword by John Dewey (Chicago, Willett, Clark and Colby, 1927; xxx, 300 pp. $3.00). In a short review it is impossible to catalogue all the errors crowded into three hundred pages. The reviewer must be content with samples. Dr. Morrison's scheme for the outlawry of war is an entire system involving *"nothing short of a world revolution!"* It involves a solemn treaty of all the nations abolishing war as an "institution"; the creation of a "real" world court; and the formulation of a "real" code of international law. The author admits that each of the three elements is essential; if one part fails, the whole structure collapses. His desire for a "real" code of international law rests on his constant but erroneous assertion that "three-fourths" of existing international law is law of war. The reviewer notes one example (not mentioned by Dr. Morrison): John Bassett Moore's famous *Digest of International Law* is in seven volumes; only part of one volume deals with the law of war. Dr. Morrison viciously flays the League effort at codification. He has obviously not studied the records of the Committee of Experts nor the governmental replies to their questionnaire, both of which he might find illuminating. Totally ignorant of the history of codification in Roman law, modern civil law, and Anglo-American law, he assumes that a "sufficient" code of "relevant law" could be agreed to in a moment. Basic also is the fallacy that there can be no law unless it be in a code; a study of the common law of England is recommended. He longs for a code "as definite [*sic*] as the Constitution of the United States". Another basic fallacy is the misconception of "arbitration", which in international law is descriptive of a judicial function, not a compromise. Dr. Morrison's ignorance of the World Court is similarly abysmal. He has no conception of its formation, nature, or the wide extent of its compulsory jurisdiction. He should study the Mavromatis cases as an example. He overlooks the recurrence of "illegal" civil wars in history, and has evidently not studied the history of the slavery question, though he expounds it. He misconstrues the Covenant of

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the League and the Geneva Protocol of 1924. He says "it is generally agreed" that our present dispute with Mexico involves the Monroe Doctrine. The book is not made more convincing by its vigorous denunciation of all others who have labored in the same field.—PHILIP C. JESSUP.

The Origin of the Right of Fishery in Territorial Waters by Percy Thomas Fenn, Jr. (Cambridge, Harvard University Press, 1926; xv, 245 pp.) is a thesis for the doctorate at Harvard University. As stated in the author's preface, it is a "study of pure theory . . . . which at times enters the field of jurisprudence." According to Professor Fenn, "The law is one thing. The theory of the law is another." But the subsequent pages constantly afford evidence of the fact that they are united in a close union from which the author is not able completely to divorce them. Indeed, in dealing with the Grotius-Selden dispute over the freedom of the seas, he remarks: "The fiats of the *ius gentium,* of the *ius naturale,* and of the *ius civile* simply had nothing to do with it. The reason why Spain and Portugal failed to make good their claim was this, that it was unworkable." However, the value of the book is not diminished by considering it as an exposition solely of theory and not of fact. One may say further that it deals especially with the theories of individuals and is perhaps more effective in its particular than in its general aspects. It affords without doubt the most complete collection of citations, quotations and references on the subject of the legal status of the sea in early theory to be found anywhere. The more important views of various writers are quoted textually in the original Latin. There is a bibliography listing the work of some two hundred writers. After brief—and not wholly clear—reference to Grecian views, Professor Fenn turns to the Roman lawyers and carries their works down through the Glossators, Post-Glossators and the "Jurisconsults". A chapter on Germanic and another on Feudal law are included. There follows a chapter on "Acquisition of Rights of Property in Maritime Fisheries" which is in turn succeeded by a long chapter on "*Mare Liberum* vs. *Mare Clausum*". The latter chapter contains a full analysis of the arguments of Grotius and of Selden, and is especially to be noted for its treatment of the lesser known writers of the same period both in England and on the Continent. The last chapter rather disconnectedly deals with "The Case for the Venetians". Although one may differ from Mr. Fenn in his conclusions relative to the Roman law and such controverted topics as the distinctions between *dominium, proprietas* and

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imperium, or *res publicae, res communes* and *res nullius,* it is safe to say that no one working in this field of theory before the middle of the seventeenth century can afford to neglect the results of Mr. Fenn's scholarly researches. It is to be regretted that the author did not include an index.—PHILIP C. JESSUP.

Professor Herbert F. Fraser's *Foreign Trade and World Politics: A Study of the International Foundations of Prosperity with Particular Reference to American Conditions* (New York and London, Alfred A. Knopf, Inc., 1926; xi, 346 pp. $3.25) is a closely reasoned and singularly readable analysis of the rôle of commerce and finance in shaping the conditions and course of international relations. It is also an illuminating exposition of the connections between economics and politics—two sciences which, as the author rightly feels, have fallen too far apart in these times of intense specialization. The study begins with a careful explanation of the fundamental principles of international trade and finance. The subject is old, but Professor Fraser treats it interestingly, the more by reason of the fact that his principles are copiously illustrated from, and cleverly expounded in the light of, the tariff and foreign-trade policy of the United States. His views on the tariff are stated unequivocally. Whatever merit protection may have had in the past, it has now been outgrown; for farmer and exporting manufacturer alike it is rather destructive than protective; it must be abandoned (gradually, to be sure); even the Republicans will in time see the light. From this the discussion moves on to "the economics of imperialism," which is handled a little less impressively; and then to "reparations and interallied debts," where the prediction is made, and buttressed with arguments, that the Dawes Plan, while giving the world a welcome breathing space, will fail after probably not more than five years. At this point the emphasis shifts from the economic to the political, more particularly to a demonstration of the "folly of building an international economic system in a world lacking international organization." The "great moving forces of world politics, imperialism and nationalism" are examined at some length; their relations to the World War are reviewed; the inescapable connections of the United States with world politics are stressed; and international organization is dwelt upon as "the greatest political problem of our age." "Economic science can tell us what is necessary to lay the international foundations of prosperity, but its answer can never be complete; we must turn to political science and learn what are the necessary legal and political conditions of economic well-being."

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One feels that in these political chapters the author's grasp is less sure; some of the deductions are questionable, and there is a good deal of rather doubtful generalization. The main argument is, however, entirely sound, and one might wish that the facts upon which it is based could be forced upon the attention of every American isolationist.—FREDERIC A. OGG.

The Legal Aspects of Zoning, by Newman F. Baker (University of Chicago Press, 1927; 182 pp. $2.50) is a compilation of the several articles on this subject which the author has contributed to various law reviews during the past few years. For publication in book form, however, these articles have been considerably revised, extended, and improved. The volume begins with an admirable introductory chapter on "Municipal Aesthetics and the Law," in which the scope of the police power in relation to the promotion of civic beauty is discussed and the contrast with European legal conditions is forcefully presented. The author calls attention to the changing concept of police power in the United States and predicts that the time is not distant when reasonable restrictions upon the use of private property will be held constitutional even though no immediate considerations of health, safety, morals or convenience are involved, but only the purpose of making a neighborhood more attractive by the suppression of sheer ugliness. Let it be hoped that his prophecy will some day come true. This introductory discussion provides a background for chapters on laws and ordinances relating to zoning, with a survey of procedure and methods. The question of appeals from official rulings under these laws is considered in detail. If it were possible to frame a flawless zoning ordinance, and to keep urban conditions from changing, there would be no need for a zoning board of appeals; but it is a well-known fact that a defective zoning ordinance, administered without flexibility, is one of the worst afflictions that a city council can saddle upon any progressive municipality. Zoning, therefore, is not merely a matter of making laws but of administering them. Indeed, it is primarily a matter of sensible administration. To such a small extent has this been recognized by some cities, however, that there is danger of a reaction against the whole zoning movement. In all these matters the author displays a practical point of view and an appreciation of the difficulties involved. He has not tried, as some have done, to solve the complications of the subject by ignoring them. Where the legal situation is not clear he points out just where the obscurities are. On the whole the book has been well put together, and it is written in a style that makes it

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far more readable than most brief legal treatises have been.—WILLIAM B. MUNRO.

In a pioneer study of *Party Campaign Funds* (New York, Alfred A. Knopf, Inc., 1926; xi, 296 pp. $3.00) James K. Pollock, Jr., has made no attempt to treat the whole subject of the use of money in elections, but has limited himself to questions concerning the receipts and expenditures of organized parties. His book contains a useful and comprehensive digest of the development of laws regulating campaign funds, the present status of federal and state legislation, the sources of party incomes, past and present, and the chief modes of party expenditure. The conclusion reached is that "of all the attempts that have been made to democratize party funds by enlisting more and more contributors, only one has been measurably successful, and that was the Republican attempt in 1924" (p. 79). The author holds that methods of campaigning have so changed in recent years as to necessitate the collection of large sums of money. "Campaigns cannot be frugal affairs." The reader infers that attempts to influence legislation by campaign contributions are becoming less frequent, and that most of the talk about "slush funds" amounts to little more than scandal-mongering. Nevertheless, considerable attention is given to the possibilities of reform, including the proposals (to which the author seems more than sympathetic) that the states and the nation should themselves provide funds for candidates and parties. The study is well documented and seems to summarize all of the quantitative data concerning party funds that have been available. The general remedy for eliminating sinister money influences is found by the author not in passing more laws, "but rather in improving the moral sense of the electorate and raising the standards of public service."—STUART A. RICE.

There are few foreigners who know Austria better than does M. Bertrand Auerbach, as he has already proved in several useful works. The present one, *Le Rattachement de l'Autriche à l'Allemagne* (Paris, Berger Levrault, 1927; ix, 190 pp. 10 francs 80) is excellent within its limits. It furnishes us with a well-written sketch of the ups and downs of the movement for the *Anschluss* or union of Austria and Germany since 1918, which bids fair to become one of the critical international questions in the not far distant future. Mr. Auerbach, as we should expect, is at home in the literature of his subject, including a mass of journalistic effusions, to which at times he attaches perhaps undue importance. He writes temperately and with a certain gentle sarcasm. The limitations of the work are in

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part due to the nationality of the author and in part are doubtless intentional. He is a Frenchman and it is asking a great deal of any Frenchman, however broadminded, that he should view sympathetically the prospect of an addition of some six and a half million inhabitants to the German Reich which already has a population more than fifty per cent larger than that of his own country. He may not go so far, though most of his compatriots do, as absolutely to veto it, but he cannot be expected to welcome it, and will believe as long as possible that the movement is temporary, artificial, due to propaganda, contrary to the real interests of the Austrians themselves, etc., etc. Mr. Auerbach accordingly does not pose as a well-wisher to the cause whose history he narrates. His second limitation is that he makes no real attempt to treat of the larger and graver aspects of the question, such as the very good reasons that not only the French and Italians but still more the Poles and the Czechoslovaks have for dreading the *Anschluss* intensely, or the grounds for opposition in Austria itself, nor does he discuss at all the fundamental justification of the sentiment for a united Germany which on historical and national grounds is as natural and legitimate as was that for a united Italy, or Jugoslavia, or a restored Poland or the recovery by France of Alsace-Lorraine, none of which could have been accomplished without great loss to others. Still, even if disappointed, we cannot be too severe on the writer for what he has not pretended to give us in his volume and we must recognize what he has done as useful to us.—ARCHIBALD CARY COOLIDGE.

Chapters on Machinery and Labor (Cambridge: Harvard University Press, 1926; 161 pp. $2.00), the republication in book form of George E. Barnett's articles on machinery and trade-union policy, makes available generally the best and most intensive investigations that have been made on this important subject which has engaged economists for a hundred years. One of the chapters compares the theories of economists with the facts found by Barnett. In another he reaches the two conclusions: that unions have been more successful in preventing reductions of wages than in lessening displacement, and that there is no general rule of policy to be laid down apart from special investigation of the particular circumstances. The printers, when the linotype came in, and the bottle blowers, when the semi-automatic machine came in, suffered but little displacement, and their wages and hours improved during the period of introduction. But the automatic bottle machine displaced five-sixths of the operatives and kept the wages of the other sixth from

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rising at a time when the mass of workers were doubling their wages. The stone-planer displaced one-half the stone-cutters, but scarcely affected the wages of the other half. Barnett shows in detail, in each case, the various elements of machinery, economic conditions and union policies. He covers, indeed, only three industries, but he has furnished the model and method of intensive inquiry for all investigators who may be stimulated by his work to cover other industries.—JOHN R. COMMONS.

The Law of Social Revolution: a Cooperative Study by the Labor Research Study Group (New York, Social Science Publishers, 1926; 262 pp. $1.00) is announced as the result of an experiment in group thinking, with Scott Nearing as leader. It presents most of the merits and the defects of group procedure. It is rich in generalization but exceedingly poor in verification. The conclusions arrived at are inadequately supported by the facts discovered and the facts themselves are often misleading as, e. g., when Voltaire, Montesquieu Rousseau, Morelly and Quesnay are lumped together as favoring freedom from government interference with trade and commerce. At the beginning of its study the group was faced with two questions: "One was theoretical; If there is a science of revolution, is it a part of the science of sociology? The other issue was more practical: Can the group make a contribution to the science of revolution, and hence to social science?" Both questions were answered in the affirmative and the book is given over to a justification of these answers. Some fourteen revolutionary movements are selected for study and are allotted from five pages (the Japanese revolution of 1867) to twenty-eight pages (the French revolution of 1789) for treatment. Whatever may be one's opinion regarding the possibility of formulating historical or sociological laws, it is evident that the authors of this volume are in possession of something less than the amount of material necessary for this task. Since the group accepts the usual idea of scientific law, i. e., a statement of uniformities of coexistence or sequence, it might have been supposed that precision and definiteness would have been given to the factors supposed to be uniformly related. But nowhere is an attempt made to define precisely such necessary concepts as class, class-consciousness, exploitation, productive forces, etc.—concepts which are subject to a wide variation in interpretation. Although, therefore, this study must be characterized as decidedly inadequate, one must agree with the authors that the question of social revolution has been neglected and that the amount of material available justifies a comparative study of revolutionary movements.—EDWARD S. MASON.

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Growing out of President Harding's Conference on Unemployment in 1921, the Committee on Governmental Labor Statistics of the American Statistical Association has prepared a report which, as edited by Ralph G. Hurlin and William A. Berridge, appears with the title, *Employment Statistics for the United States. A Plan for their National Collection and a Handbook of Methods Recommended by the Committee, etc.* (New York, Russell Sage Foundation, 1926; xvi, 215 pp. $2.50). While not affording a measure of the amount of unemployment, indexes of employment point to its variation. They likewise serve the individual business man, anxious to adapt his business policy to prevailing trends. "A chief advantage of employment statistics as a measure of economic activity is that (unlike other indicators of economic change) they afford a measure common to all business. One can count the number employed and so register changes alike in a cotton mill and an automobile factory, a department store and a bank, in a restaurant and on a farm." The Committee presents eleven specific suggestions. Several of these look toward the coordination of reports concerning employment, both from other national bureaus and from states, within the federal Bureau of Labor Statistics. Other recommendations deal with the facts to be secured, of which the most important are deemed to be the total number of employes on the payroll and the total wages paid for a given period. Detailed suggestions as to the collection, tabulation, and interpretation by means of index numbers, of the data secured will undoubtedly assist states now lacking machinery for the collection of employment statistics to organize it most efficiently. They will also assist, it may be confidently hoped, in bringing about much-needed uniformity in a number of directions, as with reference to classification of industries.—STUART A. RICE.

As the first of a series of publications under the general title *Politische Wissenschaft,* the Deutsche Hochschule für Politik in Berlin and the Institut für Auswärtige Politik in Hamburg present *Diplomatie* by Albrecht Mendelssohn Bartholdy (Berlin-Grunewald, Dr. Walther Rothschild, 1927; vii, 115 pp.). The volume, which consists of an anniversary address delivered by the author at the Hochschule and an appendix of documents, is not a manual of the principles and practice of diplomacy, but offers a valuable supplement to the study of such a work. A brief list of recent manuals and other works on diplomacy is included as a convenient guide to such a study. There are no indications of specific relationship between the two parts of the publication, yet a certain organic unity is

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apparent. The prefatory address is concerned mainly with the proper spirit, rather than the methods, of diplomatic intercourse and pays tribute to the manner in which the representatives of the new republican Germany have fulfilled their difficult missions abroad. The qualifications laid down for the diplomatic emissary of a nation are startlingly different from and simpler than those prescribed by the orthodox manuals. "He must . . . feel himself one with his own people. . . . He must possess the strength . . . . not to allow this community of feeling with his people to be disturbed by any dissension which may rend his home country from within. . . . Representation of the best in his own nation to foreign peoples, recognition of the good qualities in the country of his mission, and due commendation of what impresses him as good in his reports home; these are the three fundamental duties that we impose upon the diplomatist." Such definitions are in the spirit of the "new diplomacy," in which the author reposes great faith as a remedy for the evils of the old system of international intercourse—"the diplomacy of ministerial conferences, the diplomacy of Rapallo and London, of Locarno and Thoiry." Such are the functions of a diplomatic representative under a system of relationships in which important negotiations are conducted, not through him according to time-honored ritual, but directly by the official of his government possessing immediate political responsibility and power in frank personal discussion with the corresponding officials of other countries. No more need account be taken, as under the outworn system, of the threefold possibility of misunderstandings—in the instructions, in the conversation, and in the despatch. It is to the passages of the address contrasting the new diplomacy with the old that the documents forming the appendix are most closely related. Selected mainly from *Die Grosse Politik der Europäischen Kabinette*, of which the author was one of the editors, they constitute illustrations of many of the problems and difficulties of the bad old system. In view of the possibility, however, that the revolution in diplomatic procedure may prove less simply complete and less finally salutary than is hoped, these selections may be regarded as valuable materials of recent date for study by the case system of the principles and technique of a game at least as old as the organization of society in sovereign states.—J. V. FULLER.

Students and educators in France and America will extend a cordial welcome to Mr. Paul Rice Doolin's abridgment of A. Malet's *Histoire de France* (New York, Doubleday, Page and Company, 1927; ix, 490 pp. $2.00). Malet's presentation of French history

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is by far the most enlightened and fair-minded work on the subject which has ever been published in France, although the reviewer regrets the author's exaggerated moderation in his judgments of Louis XV and Robespierre—characterizations which seem altogether too commonplace to be scrupulously just and intelligent. Nevertheless, Malet's history of France gives a clear view of the evolution of France and expresses honestly the attitude of the average intelligent Frenchman. Mr. Doolin has accomplished the delicate task of abridging and editing this work with exquisite taste and a profound knowledge of French history. Indeed, thanks to his mastery of French style and his finely tempered criticism, the book has gained a quality of acuteness that the original version did not possess.—BERNARD FAY.

Friedrich Stieve's excellent edition of the correspondence of Isvolski was a great improvement on Marchand's *Livre Noir,* which was a veritable hodge-podge of papers published without any particular arrangement. But the strictly chronological order adopted by Stieve and the inclusion of all the Isvolski papers made even his five volumes unwieldy and awkward. He has now published a popular abridged edition in two volumes, entitled *Im Dunkel der europäischen Geheimdiplomatie* (Berlin, Deutsche Verlagsgesellschaft für Politik und Geschichte, 1926; 275, 263 pp.) from which all the unimportant documents have been omitted and the others arranged topically, as in the monumental edition of the German documents. The editor's purpose was undoubtedly to reach a larger reading public and to make the incriminating evidence stand out more vividly, but he cannot be accused of having omitted any of the really significant material, and for general purposes these two volumes, in spite of their sensational title, are more convenient and usable than the larger edition. There is no commentary, beyond a brief seven pages of introduction. The documents are allowed to speak for themselves, and it must be admitted that they tell a rather unedifying story of the Russian statesman's Paris activities. When all is said and done this correspondence still formulates the most serious indictment of Franco-Russian pre-war policy and lends considerable color to the theory that there was a conspiracy against the peace of the world. — WILLIAM L. LANGER.

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